

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

DISH NETWORK SERVICE CORP.

and

**LOCAL 1108, COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO**

**Case Nos. 29-CA-26129
29-CA-26130
29-CA-26252**

Sharon Chau, Esq., Counsel for the General Counsel.
Lowell Peterson, Esq., Meyer, Suozzi, English & Klein, P.C., Counsel for the Charging Party.
George Basara, Esq. and John Goodman, Esq., Buchanan Ingersoll Professional Corporation,
Counsel for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: Based upon a Consolidated Complaint, which issued on May 17, 2004, this case was heard by Administrative Law Judge Howard Edelman on June 28, 29, 30, July 1, September 27, 28, 29 and 30 2004. On February 25, 2005, Judge Edelman issued a Decision in this matter. In its exceptions to this decision, Dish Network Service Corp., herein the Respondent, asserted that the judge failed to issue a reasoned decision as required under Section 102.35(j) of the Board's Rules and Regulations by utilizing extensive portions of the posthearing briefs filed by the General Counsel and the Charging Party, which were copied *verbatim*, to provide almost the entire text of his decision. The Respondent argued that this demonstrated that the judge failed to consider any of the Respondent's arguments that were contained in its brief, and demonstrated that the judge was biased against it. Respondent requested that the Board remand the case to a different judge and have that judge review the record and issue a proper decision.

The Board, in its Order Remanding Proceedings, at 345 NLRB No. 83 (2005) stated as follows:

In order to dispel this impression of partiality, we will remand the case to the chief administrative law judge for reassignment to a different administrative law judge. This judge shall review the record and issue a reasoned decision. We will not order a hearing de novo, because the Respondent did not request a new hearing and, more importantly, because our review of the record satisfies us that Judge Edelman conducted the hearing itself properly. Additionally, we instruct the new administrative law judge to rely on Judge Edelman's credibility findings insofar as they are based on the demeanor of the witnesses.

Pursuant to the Board's Order, by Order Reassigning Case, dated October 11, 2005, Chief Administrative Law Judge Robert Giannasi reassigned this case to me "to review the record" and to issue a "reasoned decision."

On October 6, 2005, the Respondent filed a motion for reconsideration with the Board requesting that the Board revise its order to exclude the requirement that the judge reassigned

to the case rely on Judge Edelman's demeanor-based credibility findings in formulating the decision. In its Order Granting Motion for Reconsideration dated November 29, 2005, the Board stated, *inter alia*:

5 We hold that the new judge may rely on Judge Edelman's demeanor-based credibility
determination unless they are inconsistent with the weight of the evidence. If
inconsistent with the weight of the evidence, the new judge may seek to resolve such
conflicts by: one, considering "the weight of the respective evidence, established or
10 admitted facts, inherent probabilities, and reasonable inferences which may be drawn
from the record as a whole" . . .; or two, in his/her discretion reconvene the hearing and
recall witnesses for further testimony. In doing so, the new judge will have the authority
to make his/her own demeanor-based credibility findings. [citations omitted]

15 The Consolidated Complaint alleges numerous violations of Section 8(a)(1)(3)(4) and (5)
of the Act. The Section 8(a)(1)(5) allegations, commencing in October 2003¹ and continuing
through February 11, 2004, include, *inter alia*, bypassing Local 1108, Communications Workers
of America, AFL-CIO, herein called the Union, and dealing directly with employees by promising
20 them wage increases, job security, and commissions if they decertified the Union and by
promising them promotions to managerial positions so that they would no longer be part of the
unit; informing employees that their transfer requests were denied because they were shop
stewards, and urging the employees to sign a petition to decertify the Union; informing
employees that it would be futile for them to support the Union because the Respondent would
25 not sign a contract with the Union and threatening employees with more onerous working
conditions because the Union was negotiating for a contract; informing employees that it would
be futile for them to support the Union because the Union could not get employees wage
increases and could not assist employees who were discharged; bypassing the Union and
dealing directly with employees by soliciting their grievances with the implied promise that they
30 would be remedied to their satisfaction and offering to remove written warnings from employees'
files if they abandoned their Union support; acknowledging to employees that it had imposed
more onerous working conditions on them due to their Union membership and that it had
promised them wage increases if they decertified the Union; informing employees that it would
be futile to support the Union because it was trying to decertify the Union; informing employees
35 that it was not offering wage increases at negotiations because it did not want the Union; and
interfering with the employees' Union activities by disparaging the Union's shop steward. It is
further alleged that the Respondent violated Section 8(a)(3) of the Act by imposing more
onerous working conditions on its employees by assigning them heavier work loads and violated
Section 8(a)(3)(4) of the Act by discharging Brian Feldman on March 3, 2004 because of his
40 support for the Union and because he participated in Board proceedings. Finally, it is alleged
that during collective bargaining between September and January 2004, the Respondent
engaged in the following activity:

(a) Changed the Non-Discrimination provision after the parties had reached agreement
on it;

45 (b) Changed Section 1, Paragraph 2 of the Company-Union Relationship provision after
the parties had reached agreement on it;

(c) Withdrew Section 4 of the Company-Union Relationship provision after the parties
had reached agreement on it;

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¹ Unless indicated otherwise, all dates referred to herein relate to the year 2003.

(d) Proposed a Management Rights provision that granted Respondent almost complete control over all significant terms and conditions of employment;

5 (e) Proposed a grievance procedure which, at the first stage, required employees to attempt to resolve disputes directly with their immediate supervisors or Respondent's general manager, without notice to, or involvement of, the Union and, at the final stage, leaving the ultimate decision with Respondent's Human Resources representative;

10 (f) Informed the Union during negotiations that it was there not to agree to a contract and/or to give a contract so bad that the membership would never accept it;

(g) Rejected the Union's proposed compensation structure after insisting on such structure and representing to the Union that the parties were close to agreement on it;

15 (h) Proposed that future wage increases or decreases be exclusively within Respondent's discretion;

(i) Changed the subcontracting provision after the parties had reached agreement on it;

20 (j) Proposed a medical plan identical to Respondent's current plan and thereafter reserved the right to unilaterally alter that plan, as related to carriers, coverage, premiums, and deductibles;

25 (k) Refused to discuss the seniority clause after agreeing to do so;

(l) Refused to acknowledge an agreement on provisions relating to classification of employees, travel and non-discrimination after the parties had reached agreement on them; and

30 (m) Changed the recognition provision after the parties had reached agreement on it.

35 It is alleged that by engaging in this activity the Respondent failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(5) of the Act. Respondent, in its Answer, denies these substantive allegations and interposes numerous affirmative defenses. These affirmative defenses, including the Section 10(b) defense, are hereby denied.

Findings of Fact

I. Jurisdiction

40 Respondent admits, and I find, that it is a domestic corporation with its principal office located in Littleton, Colorado, as well as offices throughout the country and an office located in Farmingdale, New York, herein called the facility, where it has been engaged in the commercial
45 installation and maintenance of satellite dishes. Respondent further admits that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization Status

50 Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Unit

It is admitted that on June 21, 2001, the Union was certified by the Board as the exclusive collective bargaining representative of the employees in the following unit, and that at all material times it has been the exclusive representative of the unit, for the purposes of collective bargaining:

All full-time and regular part-time field installation technicians employed by Respondent at its Farmingdale facility located at 85 Schmitt Boulevard, Farmingdale, New York, excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

IV. The Facts

A. Background

Respondent's facilities in Farmingdale and Syracuse, New York facilities are the only facilities throughout the country that are presently unionized. At one time, installation technicians employed at the facility in Pittsburgh, Pennsylvania were represented by a union, but, apparently, that is no longer true.

The individuals who were involved herein are Brian Feldman, who was the Union's sole shop steward during the relevant period herein, and was fired by the Respondent on about March 3, 2004, allegedly, for insubordination for leaving a job after he was warned to remain on, and complete the job, and Larry DeAngelis, who became the principal negotiator for the Union beginning with the September 9 bargaining session, replacing Dennis Trainor. George Basara was counsel and chief negotiator for the Respondent, and an admitted agent thereof. The operational hierarchy of the facility is as follows: Bill Savino is the regional director covering twenty six of the Respondent's facilities with about 1,250 employees. John Shaw is the general manager at the facility and below him is Tom Murphy, installation manager. There are two field service managers reporting to Murphy, Christopher Lannon and William Glacken. In addition, Dominic Tuturro is alleged to be the installation manager at the Respondent's nearby facility in Medford, New York. All of the above, with the exception of Glacken, are alleged and admitted to be supervisors and agents of the Respondent. In addition to the above, Lynn DiPietro is the human relations representative for the Respondent covering twelve facilities in New York and New Jersey, including the facility. Finally, the Complaint alleges, and the Respondent denies, that Brian Bogart and Joseph Lugo, field installation technicians (the same job classification as Feldman) are agents of the Respondent, acting on its behalf.

B. The Decertification Movement

Bogart filed a Decertification Petition with Region 29 of the Board on February 11, 2004.² He testified that he obtained the petition by downloading it from the Board's website. About a day or two earlier he told Shaw that he wanted to file a decertification petition with the Board and he asked where he could get the petition. Shaw told him that he could get it from the

² The Regional Director approved the withdrawal of this petition by Order dated March 12, 2004, stating that Bogart requested withdrawal of the petition on February 19, 2004.

Board's website. On February 11, 2004³ Bogart arrived for work at about 7:00, attended the usual all team meeting (ATM) and, at about 8:00 asked Shaw if he could take the balance of the day off to go to the Board and file the petition. Shaw told him that he could take off the rest of the day and do whatever he wanted, as long as he punched out. Bogart also asked Shaw if
 5 fellow technician Mike Rodney could go with him, and Shaw said that he could, "Just make sure that he punches out also." Shaw never asked him why two people had to go to file the petition and Shaw testified that he doesn't recall whether he spoke to anyone about whether it was okay to let Bogart take the day off or whether he told any manager at the facility that he had given
 10 him the day off. Bogart then drove to the Board's Regional Office with Rodney. When he got to the Board's Regional Office, he gave the Board agent the petition that he had filled out, a list of signatures, and a list of the Respondent's employees at the facility, which Lugo had given him. He testified that when he asked employees if they would sign the petition to decertify the Union, he "might" have told them that employees at other of Respondent's facilities were "...making an average of \$2.00 an hour more than we were making, and the Union was the reason why."
 15 Other than his conversations with Shaw as set forth above, he had no other conversations with supervisors about the decertification petition, and had no conversation with supervisors about benefits that the employees would receive if they decertified the Union. His participation in this movement began in about mid-January when Lugo asked him to sign the petition, and he did so. Lugo then asked him if he would help him obtain more signatures on the petition, and Bogart
 20 agreed to that as well. Lugo told him that they were not getting a \$2.00 an hour raise that the other offices got because of the Union negotiations. In addition, the "lead technician," Keith Knipschild showed Bogart a computer printout that set forth what the employees at the facility would be earning without the Union. Knipschild also showed this printout to most of the other employees. It showed that Bogart would have been earning an additional \$2.00 or \$3.00 an hour to \$14.72 an hour, although he never discussed this document, or this difference, with
 25 anyone from management.

Shaw testified that he was aware that Bogart was circulating the decertification petition because Bogart mentioned it to him, but he did not respond to this information. In addition,
 30 Bogart asked him about filing the petition, and Shaw said that he didn't want to get involved. He told Bogart to go to the Board's website if he needed any information about the Board's processes. On February 11, 2004 Bogart told him that he wanted to file the petition with the Board, and wanted the day off, "And I said, go ahead." To his knowledge, nobody else went with him that day. He testified that, at the time, Bogart was on limited duty doing line of site surveys
 35 and had no jobs assigned to him that day. Shaw's testimony on cross-examination regarding the decertification movement and Bogart's participation in it, can be succinctly summarized in three words: "I don't recall."

Feldman testified that shortly before June 10, 2004, fellow employee Steve Hibbert told
 40 him that Bogart was hesitant to testify at the trial and wanted to talk to him. When Bogart called him on June 10, 2004, he was not in and Bogart left a message with his phone number, requesting that Feldman call him. Feldman called Bogart from his phone that same day and tape recorded the call. When Bogart answered the phone, Feldman recognized his voice, having spoken to him numerous times at the facility. Bogart testified that prior to calling
 45 Feldman, Hibbert told him that Feldman would tape record the call: "He told me when I call Brian Feldman that he's probably going to be recording me. So, I knew I was being recorded, especially after he said that he was going to call me back." He testified that he lied to Feldman

³ February 11, 2004 was on a Wednesday. Bogart's regular work days at that time were
 50 Sunday through Wednesday. He testified that Shaw never asked him on February 11, 2004 why he didn't wait until the following day, his day off, to file the petition.

during this conversation because he was angry at the company because he thought he might be fired due to the "Rochester incident." Sometime prior to the telephone call, Bogart and other of Respondent's employees went to Rochester, New York, where they got into trouble because of some misbehavior at the hotel they were staying at, resulting in Bogart and two other employees involved being temporarily suspended. He testified that due to this incident he was looking for another job because he was fearful of being fired. In the transcript of this taped conversation, in addition to numerous obscenities that he directs at the Respondent and its supervisors, Bogart said: "Tom Murphy gave me the form to fill out, to get rid of the Union. Tom Murphy helped me fill it out. He told me where to go. He promised me and everybody else involved a raise when all the shit was said and done."

C. Section 8(a)(1)(3)(4)&(5) Allegations Away From the Bargaining Sessions, As Alleged in Paragraphs 11 Through 29 of the Consolidated Complaint

Feldman commenced his employment with the Respondent in about 2000 as a field installation technician installing and repairing the Respondent's satellite systems. In September 2002 he was injured and since that time he has been assigned to light duty work which involved line of site or presite surveys, going to the customer's homes and determining where the dish should be placed for optimal performance. From June 2001 until his termination he was the Union's shop steward and attended almost all of the bargaining sessions. In about April, he took the Respondent's FS-3 certification test and assumed that he had passed the test because he had not heard otherwise from the Respondent. In April he told Shaw that he would like to transfer to the Respondent's nearby office in Medford, New York, and Shaw told him to speak to DiPietro. He went to DiPietro's office and told her that he would like to transfer to Medford and asked her about his promotion to the FS-3 category. He testified that he had not completed any written request for the transfer because DiPietro said that since it was a local transfer, he did not have to complete any paperwork. When he questioned her about it, she told him that because he was on light duty status he could not be promoted or transferred. When he questioned her further, she said that it was company policy. He asked her to show him the policy in writing, and she said that it was not in writing. Feldman testified further that in October he went to speak to Shaw in his office about his failure to obtain a transfer or a promotion. Shaw told him that he would not be promoted or transferred "...because of my Union affiliation...because I was a shop steward." Shaw told him that the Respondent believed that if they transferred him to Medford, the Medford office would be unionized. Shaw then told him: "I can get you a field service manager's job, if that's what you want," and Feldman asked, "You can't get me a promotion to level 3, but you can get me a field manager's job?" The field manager is a management position. Feldman is not aware of any other employee on light duty who has been promoted or transferred to another of Respondent's facilities.

Basara testified that during negotiations, the parties, at times, discussed issues other than contract bargaining issues. At one session, DeAngelis brought up the issue of Feldman's request for a promotion. Feldman had taken and passed the FS-3 test and requested the 10% wage increase that has been given in the past to employees who passed the test:

Lynn DiPietro was at that meeting and explained that the reason that he was not eligible for the increase was that he was on light duty workers' comp...under their workers' comp program, if you go on workers' comp the Company tries to find you light duty to perform around the facility. It's not the same level of work that a technician goes out and performs every day. You may drive somebody around. You may do line of site surveys. You may do some filing and those kind of things. Mr. Feldman had been on light duty for a while. And he had passed the test and now wanted to receive a wage increase. And Lynn indicated that she had gone to the Comp Committee to ask whether or not that

would be appropriate and they told her that it would not; that he had to actually be performing the function of a field service specialist 3 in order to be receiving field service specialist rates. We discussed that. The Union took a break. And then they came back and they never raised it again.

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Basara testified that he is personally unaware of any other situation where an employee of the Respondent was denied a promotion to FS-2 or FS-3, although "...I don't generally get involved with those things. That's not part of my responsibilities."

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Turturro, who has been the installation manager at the Medford facility since November, testified that in about September, when he learned that the Respondent was going to open a facility in Medford, he told Shaw that he was interested in transferring to Medford as an installation manager and Shaw told him that he would have to complete an internal transfer request (ITR) and Shaw would review it with human resources and submit it to the

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Compensation Committee. Turturro then completed the form and gave it to Shaw. In addition to himself, a field service manager transferred with him and six technicians transferred from the facility to Medford in the Spring of 2004, after Feldman's discharge. He testified further that at a regular ATM meeting of technicians in about October, Turturro announced that he would be

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opening the Medford office and if anybody were interested in transferring, they should see him in his office. There were about fifty people attending the meeting although he is not certain that Feldman was there. Feldman never told him that he was interested in transferring and he never received an ITR from him. These forms are available in the employees' break room.

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Shaw testified that he does not have the authority to grant wage increases or promotions to employees although he can suggest such action to his supervisor. Any promotion or wage increase would require the completion of some forms and would have to be approved by his supervisor, human resources and the Comp Committee; transfers would require an ITR.

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Whenever he discussed a transfer or a promotion to supervisory status with an employee at the facility, he told them: "...once you leave Farmingdale, you're leaving the CWA bargaining unit."

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He testified further that he never offered to promote Feldman to another position in the Company and never told him that he was not getting promoted because of his Union activities. Feldman did ask him about transferring to the Medford facility, and he told Feldman to speak to DiPietro about it. He also testified that he discussed it with DiPietro and she informed him that because Feldman was on light duty he could not be transferred, and he never received an ITR from Feldman. In addition, after Feldman passed the FS-3 test, he asked Shaw about a promotion to FS-3. Shaw discussed it with DiPietro and she informed him that an employee who is not capable of performing the duty involved in the new classification could not be promoted to that classification, and he informed Feldman of that determination.

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DiPietro testified that at one of the negotiation sessions in about September, DeAngelis said that Feldman had passed the FS-3 test and they were wondering why he had not been promoted to that level. She told DeAngelis that she checked with the Respondent's main office and its Comp Committee and, although Feldman passed the test, he could not be promoted because he was not performing the job duties of an installer. At the time he was on light duty

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and, occasionally, acting as a dispatcher. Prior to that day, she told Feldman the same thing. After that discussion with DeAngelis, the subject of Feldman's request for a promotion never arose. In addition, in about mid-2003, Feldman asked her about transferring to other of Respondent's facilities, initially, Arizona and, subsequently, the Medford office. She, initially, told him that he would have to complete an ITR and subsequently told him of positions that were

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available in Arizona, but not technician positions, and he said that he was only interested in transferring to a technician position. She also told him that she didn't know when the Medford office would be opened. It became operational in about November. She testified that all

employees, from FS employees to the general manager, who want to transfer must complete and turn in an ITR, but Feldman never did. An ITR is not necessary for a promotion from FS-1 or FS-2 to FS-2 or FS-3, but it is required for a promotion to an upper level position, such as field service manager or a transfer to a different location. In answer to questions from counsel
 5 for the Charging Party, DiPietro testified that she never told Feldman that he was not eligible to transfer to Medford:

Q It never had anything to do with his light duty?

10 A I never looked into that.

Q So, you never told him that he would not be able to be transferred to Medford?

A I don't recall ever saying that he couldn't be transferred to Medford.

15 Q But you told him there were no jobs available in Medford?

A I think you misunderstood. I never said Brian couldn't transfer to Medford because of his light duty.

20 Q But you did tell him that there were no jobs available at Medford for him to transfer to, correct?

25 A I don't believe I said that there were no jobs available for him to transfer to. I may have said we haven't, you know what, I'm not exactly sure. But I never told him that there were no jobs available.

Hibbert, a field service technician employed by the Respondent, testified about conversations that he had with Bogart and Lugo, fellow bargaining unit technicians on a morning
 30 in January 2004 in the cafeteria at the facility. He was in the cafeteria with about four other employees. Bogart walked into the room holding a piece of paper and asked the employees to sign it to vote out the Union. Hibbert told him that he was crazy for doing that, took the paper, threw it on the floor and said that he wouldn't sign it. Bogart told him that he was crazy, that he wanted the \$2 raise and walked out. Shortly thereafter, Bogart returned to the cafeteria, this
 35 time with Lugo, who asked Hibbert to speak to him in private. They went to the dispatch area and Lugo spoke about getting rid of the Union: "He said he brought the Union in, and he was going to bring them out." He also said that he would get a \$2 raise. When Hibbert asked how he could get that, Lugo said that he had "Bill Savino's ear." Rony Ramah, who was employed by the Respondent as a field service technician for about eighteen months until he was terminated
 40 in May 2004, testified that he was in the cafeteria on a morning in January 2004 with about five or six other technicians when Bogart walked into the room with a yellow piece of paper. Murphy walked into the room with him, but then walked to the doorway, about four to ten feet away, although Ramah's affidavit given to the Board does not refer to Murphy's presence. The paper that he had was to decertify the Union, and Bogart said that if they decertified the Union they
 45 would get a raise, they would earn commissions, and they would get a raise for every test that they took. Bogart handed the paper to Hibbert, who looked at it and threw it on the floor. Bogart then whispered something to Murphy and they left the cafeteria together and Lugo walked in and began speaking to the technicians, although his affidavit to the Board does not mention Lugo coming into the room. Lugo spoke about decertifying the Union and receiving pay raises
 50 and commissions. Hibbert asked what would the Respondent do for the employees if they decertified the Union, and asked, "Why can't we get this stuff in writing? If it's in writing, then maybe it'll work." Hibbert said that if it wasn't in writing, he wouldn't sign.

There is a further allegation regarding Hibbert, Turturro and Murphy that followed the above incident. Hibbert testified that later that day, Lugo told him that Murphy wanted to speak with him in the warehouse, so he went to the warehouse and met with Murphy and Turturro.

5 Turturro said that they were not going to get a contract "...because Dish wouldn't allow it." Turturro also said that the work load was heavy because of the Union, although Hibbert testified that Turturro has no control over the work load at the Farmingdale facility, Murphy does. Murphy then told him (but said that it was off the record) that without a union they could be making a lot more money, like \$17 an hour. When he asked how he could do that, Murphy said, "You know
10 what you have to do. You have to vote out the Union." Hibbert asked for something in writing to that effect, and Murphy said that he couldn't do that. Murphy then mentioned two employees who were fired, and the said that the Union couldn't do anything about it. Lugo joined the discussion at a certain point and said that they could vote out the Union and see how it works: "If it doesn't work out, then we'll vote in the Teamsters." At about that point, another technician
15 named "Andrew" or "Andrews" became part of the conversation and Lugo told him that if they voted out the Union they would get a \$2 raise. Lugo then asked "Andrew" to sign the paper, apparently the list of employees supporting the decertification, but he refused. Lugo and Murphy then told Hibbert that they would like to meet with Feldman, and Hibbert told Feldman about this request.

20 Turturro testified that he went to the Farmingdale facility in about January 2004; there was a snow storm that day, and as he lives closer to the Farmingdale facility, he went there to do his work rather than driving to Medford. He walked into the ATM room while Hibbert was speaking to a fellow employee about the Union negotiations. One of them asked Turturro what
25 he thought about the chances of the parties reaching an agreement, and he told them that he didn't think that it was very likely since they had been bargaining for three years. He testified that he did not participate in the bargaining, but that he was basically giving his opinion that if they hadn't reached agreement in three years, it was unlikely they would ever reach agreement. He testified further that he never said to them or any employee at the facility that the Union
30 would not get a contract with the Respondent any time soon, and never spoke with any employee about the work load at the facility.

Murphy testified that he had a conversation with Hibbert about the Union at the end of January or early February 2004. Another employee, Andrew Romanelli was also present.
35 Hibbert asked Murphy how much more money the employees could earn if the Union were decertified. Murphy answered that he didn't have anything to do with that and had no information in that regard. Romanelli asked him whether the employees would have better job security with the Union, and Murphy said that with or without the Union, the company didn't fire people for no reason, and "...of the people we terminated in the past that we fired them for good
40 reason and that, at that time, the Union couldn't do anything for them... To my knowledge, there were no charges or nothing brought up from the Union to Dish Network." At the hearing herein, when Murphy was asked who were the individuals that were discharged, he testified: "Nobody in particular."

45 Hibbert told Feldman about his conversation with Murphy, Turturro and Lugo, and Feldman told him that he would meet with Lugo on Friday morning, apparently January 13, 2004 and would meet for lunch with Murphy. Hibbert was with Feldman when he met with Lugo at a restaurant at about 7:45 a.m. Hibbert testified that Feldman asked Lugo, "What can I do? Why are you doing this?" Lugo did not answer at first, but when Feldman repeated the question,
50 Lugo said, "I brought the Union in and I'm going to get them out. They're not doing anything for us and we need the money." Feldman testified that Hibbert called him and told him that Lugo wanted to meet with him and that Murphy wanted to have lunch with him. He met with both of

them, separately, the same day, January 13, 2004. Feldman, Hibbert and Lugo met at the Newsstand Deli at about 8 a.m. Feldman opened the meeting by asking Lugo, "Why are you leading the charge in the decertification? You worked here for a little over a year. You quit the job. You were gone for two years. And then you come back and, all of a sudden, you're leading the charge. Did they promise you the IT position?" Lugo said that they didn't. Lugo said that the employees were complaining about not getting raises, and he asked Feldman to get him something in writing from the Union saying that the Union told the company that they could give the raises. He said that if he got such a letter he would take it to Savino and push for the raises. When Feldman asked how he was going to do that, Lugo said that he had "Savino's ear." Lugo asked Feldman if he had the Union's contract proposal and Feldman said that he wasn't supposed to show it to him, but he showed Lugo the Union's last proposal that the Respondent rejected. Lugo looked at it and said that it was fair and he couldn't understand why the company didn't agree to it.

Later that day, Feldman and Hibbert met with Murphy for lunch at the Newsstand Deli . On direct examination Hibbert could recollect almost nothing about this meeting until he was shown the affidavit he gave to the Board on March 9, 2004. Even after being shown his affidavit, his recollection of the meeting and his conversation with Murphy on the drive back to the facility was hazy. He testified that Feldman asked Murphy why the company was offering the technicians more money, and Murphy answered that they didn't need the Union, because they would have to pay dues to the Union which would cost them more than the raises they might get. He told them that the Union couldn't get them more money. After being shown his affidavit again, to refresh his recollection, he testified that while driving back to the facility, Murphy told him that the employees could make more money without the Union. Feldman testified that when he met with Murphy he told him: "You called the meeting, what do you want?" Murphy said that he wanted Feldman to suggest ways "to make the place better." When Feldman asked Murphy why he was sending employees on the roof in ice and snow and telling employees that they had to work overtime, Murphy answered that it was Shaw, not him, who was doing that. Feldman also asked Murphy why he was "riding the guys" by giving them five jobs a day.

Murphy testified that he met with Feldman and Hibbert at the Newsstand Deli at about the beginning of February 2004. Hibbert had asked him if he would meet with them "...to discuss some issues that were going on around the office that maybe we can clear up." Murphy's affidavit, which was submitted to the Board by the Respondent, states that Feldman requested the meeting; Murphy testified that Feldman did not request the meeting directly with him, he did it through Hibbert. Hibbert drove Murphy to the meeting. The first thing that Shaw told them was: "I can't talk about any type of money issues. That's not why we're here...we can talk about other issues that are going on and if I can help I will." At this meeting, they discussed workload and training issues. Feldman brought up the New York overtime law, and Murphy told him that the Company did not require employees to work overtime, but they did expect employees to complete their work at the end of the day.

Hibbert testified that when they returned to the office after the Newsstand Deli meeting, Murphy said that he was going to arrange a meeting for Hibbert and Savino. He was asked:

Q Do you recall whether Mr. Murphy indicated why he wanted to make this arrangement?

A Why? I know it was because of the money. I wanted to see proof in writing that we was going to get a pay raise and stuff like that, so he was going to make arrangement... That's all I know.

Q Do you recall if he mentioned anything about a computer?

A Yeah, Bill Savino showed him something on the computer grid. I remember that, but it didn't, it didn't go that way.

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Q Okay. With respect to what Tom Murphy said to you about the computer grid, do you recall if he explained to you what the computer grid is about?

A Yeah, it was a pay scale about how much more money I could be making without the Union.

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Q Do you recall anything else?

A No.

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Q Do you remember speaking to Chris Lannon?

A Yeah, I remember speaking to Chris Lannon.

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Q And where was this?

A That was in the manager's office.

Q Do you recall what Mr. Lannon said?

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A He didn't think we were going to get a Union voted in.

Hibbert further testified that after the ATM meeting on about February 4, 2004, Shaw called him into his office and said, "I heard that you wanted to see something in writing" and he showed him "the computer grid" on his (Shaw's) computer, which showed what wages the technicians would be making without the Union. It showed that he would be earning \$16 an hour rather than the \$11 that he was presently earning. After showing Hibbert this information, Shaw told him: "This stays under your hat." Hibbert did not say anything to Shaw about this computer grid.

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Shaw testified that he had access to a document on his computer that listed what the employees at the facility would earn if their pay was at the level of the Respondent's non-union offices. It was an Excel spreadsheet that was e-mailed to him by DiPietro at his request: "I was just curious of what it would be. What the techs would make." He testified further that he doesn't remember at any time asking Hibbert to come to his office to look at his computer screen: "I definitely did not share it with the technicians." DiPietro testified that she prepared a chart listing the difference between the wages received by the unit employees at the facility and what they would have received if they were non-union. She obtained this information from the Respondent's corporate headquarters in Denver. The only individuals that she shared this information with were Basara and Shaw. She forwarded it to their computers, but never printed it.

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The next allegation involves occurrences at two ATM meetings that took place at the facility on about February 4 and February 11, 2004. Hibbert testified that the first meeting was chaired by Shaw and, at the conclusion of the regular meeting, Shaw "put Joe Lugo on the floor." On cross examination, he testified that Shaw left the room before Lugo spoke, but he is not certain whether Shaw introduced Lugo before leaving, or whether Lugo took the floor on his

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own initiative. Lugo said that he wanted everyone to sign to get rid of the Union. He said that if they got rid of the Union they could earn more money. Feldman asked Lugo how he got to address the employees when Feldman wasn't allowed to do so. Other employees also spoke in response to Lugo's statements, but Hibbert could not remember what was said during this

5 "argument." After this meeting, Hibbert was with Feldman when Lugo approached him and said that he wanted to apologize "...for the argument, that he had to put on a show to make it look good so he could get the promotion." Feldman testified that at the conclusion of the regular ATM meeting chaired by Shaw, Shaw said, "I'm turning the floor over to Joe Lugo" and he left the room. Lugo had a piece of paper in his hand for the decertification petition and he asked the

10 employees to sign it. Feldman asked Lugo who gave him permission to speak at the meeting, and Lugo said that Shaw gave him permission. Feldman also told him that at their meeting the prior week when Lugo asked to see the contract proposals and Feldman gave it to him, Lugo said that it was a good contract, and, at his request, Feldman gave him a letter from the Union approving of the raises. Lugo said that the letter wasn't good enough. Feldman said that if Shaw

15 gave him permission to speak, he wanted equal time and he raised his voice and asked Shaw to come in to the room, but he did not appear. He testified, "The meeting got out of hand. Guys were yelling back and forth. And I just walked out. I had enough." As he was walking, he heard Lugo calling him, but he kept walking. Lugo tapped him on the shoulder and Feldman said, "That was not right what just happened" and Lugo told him to calm down, that he had to put on a

20 show for the company. Feldman asked him what he was talking about, and Lugo said that he got a promotion to an IT job at \$46,000 a year. At 5:00 that day, Feldman went to speak to Shaw in his office, and asked him if he heard what happened at the meeting. Shaw said that he heard that it got out of hand and Feldman said that it wasn't right to do that on company time, and asked, "Did you give him permission to do that?" Shaw answered that he did. Feldman told

25 Shaw that he wanted equal time and Shaw said, "I'll tell you what. We'll even it out. You get to talk to the guys at next Wednesday's ATM meeting." Feldman asked, "About Union business?" Shaw initially said that he couldn't allow it, but when Feldman complained that he had allowed Lugo to talk, he agreed that Feldman could do it, that one time.

30 Shaw testified that ATM meetings are held regularly on Wednesdays at 7 a.m. At a meeting in the latter part of February 2004, Lugo, who Shaw testified is no longer employed by the Respondent, spoke. At the conclusion of Shaw's discussion, where he generally opens the meeting by asking if anyone has anything to say, Lugo said that he wanted to address the employees about the Union. Shaw "gave the man the time to speak" and left the room, because

35 he didn't want to get involved in the Union issue. He heard that it "got noisy" and "got heated" and he returned to the room and told them to keep it cool. After the meeting, Feldman complained to him that he was never allowed the opportunity to speak about the Union on company time and he wanted equal time, and Shaw told him that he would open up the floor to him at the following meeting.

40 Feldman testified that at the next ATM meeting on the following Wednesday Savino, as well as Shaw was present. Shaw told the technicians present, "As you know we had a little incident last week. I'm turning the floor over to Brian if you have any questions." Feldman told the technicians, "Okay. Here's your chance. If you have any questions, let's get them out now."

45 The only question asked was from Ramah, who asked Savino why they weren't getting raises, and Savino said that they weren't getting raises because the Union did not give back during negotiations meaning, according to Feldman, on the points issue. That was about the extent of the discussion during this meeting. Shaw testified that at the conclusion of his comments at this meeting, he asked if anybody had any issues that they wanted to bring up and Feldman stepped

50 up. Shaw testified that he does not recall whether he remained in the room for the remainder of the meeting or whether Savino was present at the meeting.

There was an incident involving Feldman and Savino in DiPietro's office following this ATM meeting. Feldman testified that at the conclusion of this meeting, Savino asked to see him in his office and they walked into DiPietro's office. Feldman was walking behind Savino and Savino turned around, "got right in my face" and said, "You're a disgrace." Feldman asked, "What did you call me?" and Savino repeated, "You're a disgrace. You're feeding these guys all kinds of propaganda." Feldman said, "Propaganda? What did you just feed these guys?" Savino again called Feldman a disgrace and Feldman told him not to call him a disgrace and Savino asked, "Are you calling me a liar?" Feldman said, "Yes, I'm calling you a liar" and Savino said, "The meeting is over." As he was leaving the room, he told Savino, "Tell your managers to stop telling the guys that if they sign the decertification they'll get their raises." Savino said, "That didn't come out of my mouth" and Feldman told him that it had to stop or they would have to answer to the Board. Feldman testified that Savino was not telling the employees the entire story by telling them that the Union never okayed the raises to them.

Savino testified that he arrived at the ATM meeting shortly after it started, addressed the employees, and then asked if there were any questions. The first question was about the equipment that is employed by the Respondent. The next question was why the Respondent did not give raises to the employees at the facility. Savino testified that he didn't know that questions about the Union would arise at this meeting, and clearly saw Feldman whisper to the person in front of him to ask that question. Savino responded that to the best of his knowledge, the Union was negotiating with Basara for the Respondent: "the company wanted points. We have a system in Farmingdale where they give points out. And they wanted to take the point system away for an increase." After the meeting, he asked Feldman to speak to him in DiPietro's office. When Feldman came in to the office, Savino said, "I came here to talk about company issues and some of our concerns. Why did you feel the need to turn this into a Union debate?" He also asked Feldman why he had to ask others to ask questions for him, why he couldn't ask them himself. Feldman said that the men have the right to know, and Savino said, "Now they know that we tried to negotiate raises for them. And it didn't happen." Feldman called him a liar and he said that he shouldn't call him a liar. Feldman said that he was trying to spread propaganda, and Savino said, "You're a disgrace and this conversation is over."

DiPietro testified that she was behind Savino and Feldman as they went into her office. She heard Savino ask Feldman why he had other employees ask questions for him at the meeting and Feldman said that the employees need to know the facts and loudly called Savino a liar. Savino said that Feldman was a disgrace, and the conversation was over.

It is alleged that since about November, the Respondent imposed more onerous and arduous working conditions on its employees by assigning them heavier workloads, in order to discourage Union membership, in violation of Section 8(a)(1)(3) of the Act. There is no "smoking gun" evidence assisting in establishing this violation. Rather there is testimony from both Counsel for the General Counsel's and Respondent's witnesses, some rather nebulous, regarding the work loads of the technicians at the facility. Hibbert testified that, at one time, Turturro told him that "because of the Union, that's why our work load is heavy." He was asked about this statement on cross examination:

Q So, when your affidavit states: "He said that he was already doubling our work load," that's a misstatement in your affidavit?

A Okay. He wasn't doubling our work load, because he don't control our office.

Q So, that's a misstatement?

A Yeah, but he was saying that the work load is heavy because of the Union. That's what he meant by it.

Q And he has no control over your work load, is that correct?

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A No, he doesn't have the control. Tom does.

Hibbert's testimony on this subject is far from a model of clarity, but he testified that for about a year prior to June 2004, he had been assigned four to five jobs a day (for a ten hour shift); prior to that, he performed three jobs a day.

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Feldman testified that it is difficult to generalize on how long an installation will take to be completed. A lot depends upon the size of the house, the type of installation, the experience and skill of the technician and whether the wires on the outside of the house have to be hidden: "There's too many factors involved." When Feldman began his employment with the Respondent in March 2000 the technicians worked a five day schedule from about 7:30 to 5:00 p.m. About three weeks later, before the Union came into the picture, this changed to a four day ten hour a day schedule, as it remained through the period of his employment with the Respondent. Feldman's testimony about the alleged increase in the work load for technicians is also somewhat confusing. He testified that the Respondent used to assign two technicians to work together, and then had the technicians work by themselves. At the beginning of 2004, the Respondent increased the technicians' daily workload to five jobs. He testified that he learned this by speaking to other technicians at the facility and seeing their assignments in the morning. On the two occasions when he drove and assisted Rodney Alvarez, Alvarez was assigned two and four jobs. Feldman testified that the number of pre-site surveys that he was assigned to did not increase since November.

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Turturro, who assigns jobs to the technicians at the Respondent's Medford facility, testified that the number of jobs assigned to the technicians average four a day, ranging from about three to five, depending on the job and the workload. In scheduling jobs: "I try to group them so they are geographically close together and that there is enough work that will keep them for 10 hours and not go overboard." Shaw testified that, on average, technicians are assigned to four jobs daily over the ten hour day, less a half hour meal break. The number of assignments has remained fairly consistent since about 2001, when he became general manager at the facility. Travel time to, from, and between jobs is taken into consideration in making these assignments. Murphy testified that technicians are routinely assigned from three to five jobs daily: "If the jobs were lighter jobs or easier jobs, they may get an additional job added to their route. If they were harder jobs or heavier jobs they would get less jobs."

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Murphy testified that in making the daily job assignments for the technicians he attempts to assign them to a geographical area so that they do not have to travel too far in a given day. Additionally, he considered the ability and experience of the technician in determining what jobs, and the number of jobs to assign to them. When employees are interviewed for hire, they are told that when they begin a job, it is expected that they will complete the job before returning to the facility. During 2003, and in about January and February 2004, the daily workload of the technicians ranged from three to five jobs, depending on the nature of the jobs: "If the jobs were lighter jobs or easier jobs, they may get an additional job added to their route. If they were harder jobs or heavier jobs they would get less jobs."

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It is further alleged that on about March 3, 2004 the Respondent discharged Feldman because of his Union activities, and because of his participation in Board proceedings, in violation of Section 8(a)(1)(3) and (4) of the Act. There is no question of Feldman's Union

activities and the Respondent's knowledge of these activities. Feldman was the only Union shop steward at the facility and attended all but one or two of negotiation sessions on behalf of the Union. In addition, beginning in about 2001 he provided affidavits to the Board regarding unfair labor practice charges, and testified in a trial in about 2002 involving the Respondent. He testified that at about 6:30 a.m., on February 4, 2004 (the same day that Lugo spoke at the ATM meeting as discussed above) he, DeAngelis and others handed out two leaflets prepared by the Union for the technicians. He remained there for about twenty minutes and testified that Murphy observed him distributing these leaflets while standing outside a doorway at the facility smoking a cigarette. The leaflets refer to the Respondents unwillingness "to negotiate a fair and equitable contract" by making substandard offers to the Union and asked the employees to continue supporting the Union so that the Respondent would negotiate in good faith with the Union.

Feldman's discharge was based upon the events of February 26, 2004. On that day, he was assigned to drive and assist Rodney Alvarez, who, apparently, had a driving license problem. On that day Feldman, admittedly, left the job that he and Alvarez were working on early, and prior to its completion. He testified that, prior to the start of that work day, he informed Lannon, a field service manager, that he had to leave work by 5:30 that day; Respondent defends that Feldman never notified any of the managers that morning that he had to leave early that day. Feldman testified that when he arrived for work on that day, expecting that he would be performing pre-site surveys, he asked for his site survey sheet, and Lannon told him that he was not doing site surveys that day, he would be driving Alvarez. Feldman told Lannon, "I have to leave by 5:30, can you get somebody else to take him?" Feldman also told Lannon that because of his injury, he couldn't physically help Alvarez, and Lannon said that all he had to do was to drive him. Feldman testified that the reason he had to leave work early that day was because he had a "celebration" or "outing" with his father. Feldman looked at Alvarez' assignments for the day and saw that the afternoon job would take at least four hours for him to complete, so he told Alvarez to ask Lannon if he could assign somebody who could physically assist him. About five minutes later, Alvarez returned and said that Lannon said that Murphy "insists" that Feldman keep the assignment and Alvarez also spoke to Murphy, who told him the same thing. Before leaving with Alvarez, Feldman again told Lannon that he had to leave by 5:30, and Lannon said, "No problem" or, "Don't worry, you'll leave by 5:30." When they got to their morning job, they had to cancel it because there was no line of site from the roof to the satellite and their next job was not until noon. He testified that "standard procedure" is if you have a lot of free time between jobs, "you call around" to see if any other techs need help. He called Ramah, but he didn't need assistance, and called Hibbert, who did need assistance, so he and Alvarez drove to Westbury, where Hibbert and a "brand new guy" were working. They finished shortly after 11:00 and drove to their 12:00 Noon job, but nobody answered the door, so they went for lunch. They returned to the house at about 1:00, but still nobody answered the door, so they waited in front of the house. At about 3:00, Feldman called the dispatcher at the facility, told him of the situation, and asked if he could call the house in case the customer was sleeping. A few minutes later, dispatch called Feldman to say that there was no answer in the house, but the customer then drove up in front of the house and Feldman told the dispatcher, "Never mind, the customer just pulled up and we're going to start the job" and the dispatcher said "okay." Feldman then told Alvarez to talk to the customer to determine what they had to do, and that he had to make a call, and he called William Glacken, field service manager and his "immediate manager." He told Glacken that the customer just arrived, that they were starting the job, but he had to leave at 5:30. All Glacken said was, "Call Tom." Feldman then called Murphy and told him, "I have to be out of here by 5:30. I told Chris twice this morning." Murphy said that he would "...call around and I'll see if I can get somebody out there."

Feldman and Alvarez started the job and, at about 4:30, Feldman called Murphy and asked: "Tom, what's the story? Is somebody going to come here to help Rodney so I can get out

of here at 5:30?" Murphy told him that nobody was available. Feldman said that he had a prior commitment and had to leave. He asked Murphy if he wanted him to leave Alvarez at the job with the hope that somebody could be located to help him or should he bring Alvarez back to the office with him. Murphy told Feldman: "If you leave the job, you're open to disciplinary
5 action." Feldman told Murphy that he had no choice: "I have to go. What do you want me to do?" Murphy told him that it was his call, and Feldman told Alvarez that he was leaving, and asked him if he wanted to stay or return to the facility. Alvarez said that if Murphy couldn't guarantee that somebody would be there to get him, he was returning with Feldman. Feldman told the customer that they were leaving and that somebody would be there to finish the job, and the
10 customer "was okay with it." They left the job at about 4:50 when it was about half completed and returned to the facility. After returning to the facility Feldman asked Glacken if they found somebody to cover the job that they left, and Glacken said, "We sent Rob. He's on his way out there." Alvarez then told him that Murphy wanted to see him, and when he asked Murphy what he wanted, Murphy told him that he would talk to him the next day. When Feldman reported for work the following morning, Murphy asked to see him in his office. Turturro was also present. Murphy told him that because he left the job the day before he was temporarily suspended, and he left the facility. After waiting for a few days, he was told to come to the facility on March 3, 2004. On that day, he came with Richard Nemschick, the Union business agent and they met with Shaw, Murphy and DiPietro. Shaw told him that they had completed their investigation and he was immediately terminated. He asked Feldman if he had anything to say, and Feldman told them of what occurred on that day and that he had told Lannon that morning that he had to leave early. He also said that five managers were available that day to help Alvarez complete the job since they knew that he had to leave early: "You sent Rob out there. What's the big deal?" Nemschick asked Shaw what kind of investigation the company conducted, and Shaw
25 said, "Well, we investigated it." Nemschick asked if they spoke to Feldman and Shaw said no. He asked if they spoke to Lannon, and he answered no. Nemschick asked what kind of investigation they conducted without questioning the persons involved and the manager, and Shaw said, "We did our investigation, and that's it." He told Feldman to punch his time clock and get off the property. Feldman testified that the Respondent's disciplinary procedure provides for a verbal warning for a first offense, a written warning for a second offense, and termination for a third offense. The only prior situations that he is aware of where employees were fired without a
30 prior warning was for an employee caught stealing and an employee who was involved in an accident and failed a drug test. The only prior warning that Feldman received was two years earlier, when he received a verbal warning for not charging a customer for an item.

35 Hibbert testified that on February 26, 2004, while in the ATM room, he heard Feldman tell Lannon that he would work with Alvarez for the day, but he had to be back by 5:30 and, after going to speak to Murphy, Lannon replied that he would be back by then. Ramah testified that on February 26, 2004, between 6:45 and 7:00 a.m. he was in the ATM room with Hibbert,
40 Alvarez, Feldman, Murphy, Lannon and others and he saw Feldman speaking to Lannon through the window (with Murphy standing next to Lannon) saying that he had to leave at 5:30; Lannon replied, "No problem, we've got a light day." Feldman asked if there was anybody else that he could send with Alvarez so that he (Feldman) could do his line of site jobs and be finished by 5:30, and Lannon told him, "No, you've got a light day. Don't worry about it. You and
45 Rodney can knock it out by 5:30."

Lannon, as the field service manager at the facility, is responsible for supervising the technicians, getting them out in the morning with the correct equipment, and assisting them throughout the day if they need help. He testified that on February 25, 2004, Murphy told him
50 that Feldman would be driving Alvarez on the following day because of a problem Alvarez was having with his license ("Rodney couldn't drive our vehicles because of insurance reasons"). He initially testified that he does not recall any conversation with Feldman on the morning of

February 26, 2004, nor does he recall any conversation with Feldman on that morning where Feldman told him that he had to leave at a certain time that day. Subsequently, in answer to questions from counsel for the Union, he testified that in the morning when Feldman came to the window for his assignment, he told Feldman that he would be driving Alvarez that day, and all that he had to do was to drive him and do the paperwork. The first that he heard of the situation was at about 3:30 that day when Feldman called Murphy and told him that he had to leave by 4:30. He overheard this conversation because the Respondent employs Nextel “walkie-talkie” type cellular phones. He heard Murphy tell Feldman that he would try to locate another technician who had completed his work who could assist Alvarez. Lannon testified that he and Murphy then split up the Respondent’s vans and began calling the technicians to see if somebody was available to assist Alvarez in his assignment. All the technicians whom he called said that they were either in the middle of a job or had an hour or an hour and a half left before completing the job. He and Murphy were initially unable to locate another technician to cover the assignment and it was not until after Feldman had left the job that he found another technician, Rob DeGratullo, to cover and complete the job. When he spoke to DeGratullo shortly after 3:30, he told Lannon that he would call him when he completed the job that he was working on, and, at that time, he knew that Gratullo would cover the job, although he did not know the time that he would arrive at the customer’s home. He anticipated that his current job would not take longer than an additional hour or hour and a half. Lannon initially testified that he does not remember what time DeGratullo called him to say that he could cover the job, but that it was after Feldman and Alvarez left the job. He subsequently testified that DeGratullo called between 4:30 and 4:45. After Feldman and Alvarez left the job, Lannon called the customer who was “very upset.” He told her that he would locate another technician within the hour to come to her house, “and everything would be done tonight.” Sometime after this call to the customer, DeGratullo called to say that he could cover the job. He initially testified that he does not recall whether he told Murphy that DeGratullo would be going to cover the job. Subsequently he testified that between 4:30 and 5:00, after hearing from DeGratullo that he had completed his job, he told Murphy that DeGratullo would be covering the job. On either the following day, or sometime after that, Murphy asked him if he had given Feldman permission to leave early that day, and he said that he hadn’t.

Murphy testified that about a week prior to February 26, 2004 Shaw told him to send Feldman with Alvarez because Alvarez “was having license problems.” When he arrived for work on February 26, 2004, he asked Lannon (as he usually does) whether there were any problems or issues that he should know about, and Lannon did not mention any problems. At about 3:30 he received a call from Feldman saying that he wouldn’t be able to complete the job because he had to leave by 4:30 and said that he had previously notified Glacken that he had to leave early and asked Glacken to notify him. Murphy told Feldman that he would do his best to find somebody to cover for him, and he and Lannon began calling the technicians in the field to see who was available to relieve them. It took Murphy about twenty to thirty minutes to make his calls, but none of the technicians that he spoke to was available to cover Feldman’s job. He didn’t discuss the situation with Lannon until about 5:30, when he went to speak to Lannon in his office. At that time, he asked Lannon if he had any success finding somebody and Lannon said that DeGratullo had completed his job and was on his way to cover the job. At about 4:30, Feldman called again and Murphy told him that, at that time, they had not found anybody who could cover for him and “that he had to stay at the job and finish working until we could find somebody for him.” Feldman then said, “Well, I’m leaving. It’s not a question of that. What do you want me to do with Rodney?” Murphy told him that if he left the job he would be subject to disciplinary action and Feldman repeated that he was leaving, and again asked what he should do with Alvarez, and Murphy said that they were both required to stay. Murphy testified that DeGratullo arrived at the job at about 6:00 and completed the job that evening. When Feldman and Alvarez returned to the facility at about 5:30, Murphy saw Feldman, but Feldman did not

say anything to him and left the facility. Murphy called Shaw, who was out of town, and told him that Feldman had walked off the job prior to completion and that DeGratullo was sent to complete the job. Shaw said that he would speak to DiPietro. Shortly thereafter, Shaw called Murphy and told him that when Feldman arrived for work the following day, he should tell him that he was being suspended pending an investigation and the following morning, when Feldman arrived for work, Murphy told him that he was suspended pending further investigation; Feldman said okay, and left. Subsequently, Murphy, DiPietro and Shaw discussed the situation and Shaw made the determination to fire Feldman. On March 3, 2004, Murphy, Shaw, DiPietro, Feldman and a Union representative met at the facility. Shaw told Feldman that he was being terminated for three reasons: "He left a customer's home with the work uncompleted, which is a safety issue. He left the customer upset, which isn't good customer service. And he also disobeyed a direct order from myself."

Shaw testified that because Alvarez couldn't drive, and Feldman had limited work ability at that time, he felt that it was a perfect match and told Murphy to assign Feldman to drive Alvarez on February 26, 2004. Sometime that day, he received a telephone call from Murphy saying that Feldman had called him to say that he had to leave work early and that he (Murphy) had tried, or was trying to get somebody to cover for him, but that Feldman left a job uncompleted that day. Shaw told him to suspend Feldman until Shaw returned and they could discuss the issue. Sometime later that afternoon, Murphy told him that they were able to locate somebody to complete the job and that he arrived within about an hour of when Feldman and Alvarez left the job. Later that evening, Shaw called Savino and told him of the incident, and Savino "agreed with my assessment to suspend him at that time." After Shaw returned, Murphy gave him all the facts of the incident:

I reviewed it with him and felt that due to Brian leaving a customer's home without completing the job, with lines unsecured, without basically finishing that job and totally against Tom's directive to stay there, with all those three things taken into consideration, I felt that it was necessary to terminate Brian's employment.

Shaw's decision to fire Feldman was based solely upon his conversations with Murphy about the incident; he had not previously questioned Feldman or Glacken. On March 3, 2004, they met and he gave Feldman the termination notice. Shaw testified that after he made the decision to fire Feldman, but prior to his leaving, there was an allegation that Feldman told Lannon on the morning of February 26, 2004 that he had to leave work early that day. If that were true, he testified that Feldman would probably not have been fired. Shaw immediately asked Lannon if Feldman told him that he had to leave work early that day and Lannon said, "It never happened."

Savino testified that after hearing from DiPietro on February 26, 2004 at about 5:00 about the facts of Feldman leaving the job, he told her to look further into it to determine whether Feldman had a good reason for leaving. DiPietro called about two hours later and said that they know of no reason for his leaving; there was no known emergency. At that point, he decided that termination was proper for a number of reasons. Feldman left the customer with the wires detached. He testified that he didn't ask anybody in what condition Feldman left the house; he just assumed that he left it with holes drilled in the walls and cable lying all over the floor. Therefore the customer had no television service and it was a safety hazard as well, although he knew that the job was completed by another technician that evening. In addition, Feldman disobeyed Murphy's direct order not to leave.

DiPietro testified that she received a call from Shaw on the day in question telling her of the conversation that Murphy had with Feldman when he directed him to stay on the job until

somebody arrived, but Feldman failed to do so and left the job prior to completion. DiPietro then called Savino to tell him of the situation, and he told her, "Gather some facts and we'll talk more about it." Shaw subsequently called her to tell her that they had located a technician to complete the job that evening. She and Shaw agreed that Feldman should be suspended pending a further investigation and that Murphy should tell Feldman of the suspension. At the time, Murphy was the only person directly connected with the incident with whom she had spoken. She subsequently discussed the situation with Murphy and Shaw who felt that termination was appropriate because Feldman left the job prior to its completion and disobeyed a direct order to stay. She told Savino "that Mr. Murphy and Mr. Shaw were looking to terminate Brian Feldman's employment. I said I would support the termination. Mr. Savino did state that...he approved it." They met at the facility on the morning on March 3, 2004 with Feldman and Nemschick. They told Feldman that he was being fired based upon the events of February 26, 2004. Feldman said that he would let his attorney handle the situation and Nemschick questioned the quality of the investigation that the Respondent conducted. After this termination meeting, DiPietro then spoke to Lannon, who told her that Feldman never told him on the morning of February 26, 2004 that he had to leave work early that day.

D. Analysis of Complaint Allegations 11 Through 29

Paragraph 11 of the Consolidated Complaint alleges that in about October, the Respondent, by Shaw, bypassed the Union and dealt directly with employees by promising them promotions to managerial positions so that they would no longer be a part of the unit and informed employees that their transfer requests were denied because they were shop stewards. In April, after Feldman passed the Respondent's FS-3 certification test, he asked DiPietro about a promotion and a transfer to the Respondent's Medford office and she told him that he could not be transferred because he was on light duty status due to his injury. Although there is no allegation that he was denied this promotion and transfer because of his Union activities, I find the Respondent's reasoning in this regard less than persuasive. While it is fairly reasonable to conclude that an employee should not be promoted to a classification that he is incapable of performing due to an injury, Respondent never explained why it permitted Feldman to take the FS-3 certification test at a time when it knew that he was on light duty due to his injury. In this regard I found DiPietro's testimony on this subject, as well as the other allegations, to be less than credible. She often had a selective failure of memory, especially during questioning by counsel for the Charging Party. Shaw's testimony, as well, was generally not believable. Whenever counsel for the Charging Party asked him a question on a crucial point, his answer, invariably, was "I don't recall." On the other hand, I found Feldman to be a credible witness and would credit his testimony regarding this allegation over that of Shaw and DiPietro. Having attended most of the negotiation sessions, being the only Union shop steward at the facility, and having been denied a promotion and a transfer, Feldman had clear and obvious animus toward the Respondent and his testimony about the events of February 26, 2004 establish that he had a "chip on his shoulder" almost daring the Respondent to do something to him. Clearly, his actions on February 26, 2004 were not that of a model employee (waiting from 12:00 to 3:00 before calling the facility to say that the customer was not home, and leaving without permission). However, regardless of that, I found him to be the most credible of the witnesses herein, who appeared to be telling the truth as he best remembered it. I was impressed by the fact that, at times when Feldman could have embellished on, or exaggerated, his testimony, he did not do so. I therefore credit his testimony over that of Respondent's witnesses throughout the hearing and find that in October, Shaw told him that he would not be promoted or transferred because he was the shop steward, but that he could get him a promotion to a managerial position. The former was a threat in violation of Section 8(a)(1) of the Act. The clear

implication of the latter statement was that it was intended as a promotion was to get him out of the unit, and I find that these statements violate Section 8(a)(1)(5) of the Act. *Leather Center, Inc.*, 308 NLRB 16, 28 (1992); *Hospital Shared Services, Inc.*, 330 NLRB 317, 318 (1999); *K-Mart Corporation*, 336 NLRB 455 (2001); *Comcast Cablevision of Philadelphia, LP*, 313 NLRB 220, 251 (1993).

Paragraph 12 alleges that in early January 2004, the Respondent, by Bogart, at the facility, urged employees to sign a petition to decertify the Union and bypassed the Union and dealt directly with the employees by promising them wage increases and commissions if they decertified the Union. Paragraph 13 alleges that in early January 2004, the Respondent, by Lugo, at the facility, urged employees to sign a petition to decertify the Union and bypassed the Union and dealt directly with the employees by promising them wage increases and commissions if they decertified the Union. Bogart and Lugo were employed as technicians and were bargaining unit members. The Complaint alleges that they were agents of the Respondent, acting on its behalf. Obviously, Lugo and Bogart, as a unit employees had the right to encourage their fellow unit members to sign a petition to decertify the Union. However, if the evidence establishes that they are agents acting on behalf of the Respondent, then they may not lawfully engage in these activities. Hibbert credibly testified that in January 2004, while in the cafeteria with about four other employees, Bogart approached them and asked them to sign a paper to “vote out the Union.” Hibbert told Bogart that he was crazy, said that he wouldn’t sign it, and threw it on the floor. Bogart said that it was Hibbert who was crazy, that he wanted the \$2.00 raise (apparently, the one held up by the stalemate in negotiations) and walked out. Shortly thereafter, Bogart returned to the cafeteria with Lugo, who asked to speak to Hibbert privately. Lugo told Hibbert that he brought the Union in and that he would bring them out, and that he would get a \$2.00 raise. When Hibbert asked him how he would do that, he said that he had “Bill Savino’s ear.” I do not credit Ramah’s testimony about this incident because the most important element of his testimony, that Murphy came into the cafeteria with Bogart and spoke with Bogart after Hibbert refused to sign the paper was not in his affidavit given to the Board and Hibbert’s testimony does not refer to Murphy’s presence. The issues herein are whether Bogart and Lugo were agents acting on behalf of the Respondent on the date of this incident and, if so, did the Respondent violate Section 8(a)(1)(5) of the Act, as alleged in Paragraphs 12 and 13?

The Board applies common law principles in deciding whether employees are agents of his/her employer and whether his/her statements and conduct are attributable to the employer. An employer is responsible for an employee’s conduct if the employee acted with the apparent authority of the employer with respect to the alleged unlawful conduct. *D&F Industries, Inc.* 339 NLRB 618, 619 (2003). In *Cooper Industries, Inc.*, 328 NLRB 145 (1999), the Board stated: “Apparent authority results from a manifestation by a principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” In *Einhorn Enterprises, Inc.*, 279 NLRB 576 (1986), the Board stated: “the test for determining whether an employee is an agent is whether, under all circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.” This is not the more common situation where the individuals in question were leadmen, regular participants in management meetings, or employees who regularly transmit information from the employer to the employees. Lugo and Bogart had none of these qualifications; they were installation technicians like all the other employees in the unit. What set them apart, however, was the fact that they were leading the decertification movement propelled, it appears, by the Respondent. I find that counsel for General Counsel and counsel for the Charging Party have established that Bogart and Lugo were agents of the Respondent acting on its behalf. Initially, I found Bogart to be lacking in credibility; Lugo did not testify. Bogart’s testimony seeking to disprove the contents of the tape recording of the June 10, 2004 telephone conversation was totally unconvincing. Not

only was it generally implausible, but I cannot believe that Hibbert, a strong Union supporter who threw the decertification petition on the floor after being asked to sign it, would warn Bogart that Feldman was going to tape his phone call. I also find unconvincing his testimony, supported by Shaw's testimony, that there was nothing unusual about his request to take off from work on February 11, 2004, together with another employee, to file the decertification petition with the Board. Bogart never satisfactorily explained why he couldn't file the petition on the following day, his day off, and Shaw could not explain why he, so matter-of-factly, allowed two employees to take the day off on such short notice. In addition, on a number of occasions, in trying to convince Feldman and Hibbert to sign the decertification petition, Bogart told them that he "had Savino's ear." Whether true or not, this statement would make employees believe that he was speaking for management. More importantly, however, to this finding is Murphy's collaboration with Lugo and Bogart in the decertification movement. In January, after Lugo told him that Murphy wanted to speak to him, Hibbert met with Lugo, Murphy (and Turturro) and Murphy told him that without the Union they could be making a lot more money, like \$17 an hour, but they would have to vote out the Union. This was the same message that Lugo and Bogart were telling the employees. Additionally, at the ATM meeting in early February, at the conclusion of the regular meeting, Shaw introduced Lugo and gave him the floor to speak. Even though it appears that Shaw left the room before Lugo spoke, by introducing Lugo Shaw reinforced the connection between the Respondent and the employees leading the decertification movement. On the basis of all the above evidence, I therefore find that Lugo and Bogart were agents of the Respondent acting on its behalf, and that by their actions as alleged in Paragraphs 12 and 13, the Respondent violated Section 8(a)(1)(5) of the Act. *Armored Transport, Inc.*, 339 NLRB 374 (2003).

Paragraph 14 alleges that in early January 2004, Respondent, by Turturro, at the facility, informed employees that it would be futile for them to support the Union because the Respondent would not sign a contract with the Union and threatened employees with more onerous working conditions because the Union was negotiating for a contract. Paragraph 15 alleges that in early January, the Respondent, by Murphy, at the facility, bypassed the Union and dealt directly with the employees by promising them wage increases, commissions and job security if they abandoned their Union support and membership, and informed the employees that it would be futile for them to support the Union because it could not assist employees who were discharged. These allegations are based upon the testimony of Hibbert, who testified that he met with Murphy after Lugo told him that Murphy wanted to speak to him in the warehouse; Turturro was with Murphy at the time. Turturro told him that they wouldn't get a contract "because Dish won't allow it." He also said that the work load was heavy because of the Union, although Hibbert is aware that Murphy, not Turturro, controls the work at the facility. Murphy then told him (off the record) that without a union they could be making a lot more money, like \$17.00 an hour. When Hibbert asked how, Murphy said that he knows what he has to do, vote out the Union. Murphy then mentioned two employees who were fired and the Union couldn't do anything to help them. Lugo then joined the discussion and said that they could vote out the Union and, if it didn't work, they could vote in the Teamsters. When another technician joined the discussion, Lugo told him that if they voted out the Union they would get a \$2.00 raise and asked the employee to sign the petition, but he refused. Although I found Hibbert to be a generally credible witness who attempted to testify truthfully, in this situation I credit Turturro over Hibbert in their recollection of this incident for the reason that it is more reasonable. Hibbert testified that Turturro was no longer employed at the facility and had no reason to know why, or if, the employees work load was increased. I also found Turturro's explanation for the statement about the bargaining history reasonable. I therefore recommend that the allegations in Paragraph 14 be dismissed. After a careful reading of the transcript I conclude that Murphy was not a credible witness in this, or the other allegations. His testimony was simply not believable. For example, he never satisfactorily explained why he met Feldman and Hibbert at the deli in

February. Further, as will be discussed further below, his testimony attempting to explain the reasons for firing Feldman was unconvincing. I therefore credit Hibbert's testimony and find Murphy's actions as alleged in Paragraph 15 violated Section 8(a)(1)(5) of the Act. *Mohawk Industries, Inc.*, 334 NLRB 1170 (2001); *Armored Transport, Inc.*, *supra*. In addition, I find that

5 Lugo's statements to "Andrew" or "Andrews", in the presence of, and with no objection from, supervisors Turturro and Murphy, by urging him to sign a petition to decertify the Union and by urging that he would get a wage increase without the Union, violates the Act as alleged in Paragraph 13 of the Complaint.

10 Paragraph 16 alleges that on about January 30, 2004, the Respondent, by Lugo, at the Newsstand Deli, bypassed the Union and dealt directly with employees by promising them wage increases, commissions, job security and special accommodations if they decertified the Union. Feldman and Hibbert met with Lugo, at Lugo's request, at the Newsstand Deli on the morning of

15 January 13, 2004. Feldman's uncontradicted credible testimony establishes that he opened the meeting by asking Lugo why he was leading the decertification movement; "Did they promise you the IT position?" Lugo said that they didn't, but that the employees were complaining about not receiving raises. He asked Feldman for something in writing from the Union saying that they told the company that they could give out the raises, because if he had such a letter, he could push for raises from Savino because he had "Savino's ear." I have found that Lugo was acting

20 as an agent of the Respondent, and therefore, by telling Feldman that he would attempt to get raises for the employees because he "had Savino's ear," Respondent violated Section 8(a)(1)(5) of the Act as alleged in Paragraph 16 of the Complaint.

25 Paragraph 17 alleges that the Respondent, by Murphy, at the Newsstand Deli meeting with Feldman and Hibbert bypassed the Union and dealt directly with the employees by soliciting their grievances with the implied promise that the grievances would be remedied and offered to remove written warnings from employees' files if they abandoned their support for the Union. According to Feldman's credited testimony of this meeting, when he asked Murphy, "You called this meeting, what do you want?" Murphy said that he wanted Feldman to suggest ways

30 "to make the place better." This solicitation of grievances violates Section 8(a)(1)(5) of the Act as alleged in Paragraph 17(a) of the Complaint. Although I have generally credited the testimony of Hibbert, his testimony about this meeting was so uncertain, and was not supported by Feldman's testimony, that I do not credit him in this situation. I therefore recommend that the allegation contained in Paragraph 17(b) be dismissed. Paragraph 18 contains three additional

35 allegations regarding Murphy's statements at the Newsstand Deli meeting. As they are not supported by any credible evidence, I recommend that the allegations contained in Paragraph 18 be dismissed.

40 Paragraph 19 alleges that Respondent, by Murphy, on about January 30, 2004, at the facility, bypassed the Union and dealt directly with the employees by promising them wage increases if they decertified the Union. Although not crystal clear, I credit Hibbert's testimony that following the Newsstand Deli meeting, Murphy told him that Respondent had a computer program that listed how much more money the employees would be earning without the Union. By this statement, the Respondent violated Section 8(a)(1)(5) of the Act as alleged in Paragraph

45 19. *Harding Glass Company, Inc.*, 316 NLRB 985, 991 (1995).

Paragraph 20 alleges that Respondent, by Lannon, on about January 30, 2004, at the facility, informed the employees that it would be futile for them to support the Union because it was trying to decertify the Union. The sole testimony supporting this allegation was Hibbert's

50 testimony that, sometime after the above described conversation with Murphy about the pay rates on the computer, he spoke to Lannon, who said, "He didn't think we were going to get a Union voted in." This testimony is too broad and imprecise to establish the violation alleged. I

therefore recommend that the allegation contained in Paragraph 20 be dismissed.

Paragraph 21 alleges that Respondent, by Lugo, on about February 4, 2004, at the facility, urged employees to sign a petition to decertify the Union. The credible testimony of
 5 Feldman and Hibbert is that at the ATM meeting, after Shaw turned the floor over to Lugo, Lugo asked the employees to sign the paper to decertify the Union. Having found that Lugo was an agent acting on behalf of the Respondent, I find that this violated Section 8(a)(1)(5) of the Act.

Paragraph 22 alleges that Respondent, by Shaw, on about February 4, 2004, at the
 10 facility, bypassed the Union and dealt directly with the employees by promising them wage increases if they decertified the Union, and informed employees that it was not offering wage increases at negotiations because it did not want the Union. The credited testimony of Hibbert is that at the conclusion of the ATM meeting on about February 4, 2004, Shaw told him that he
 15 understood that he wanted to see something in writing and showed him the computer grid on his computer which stated that he would be earning about \$16.00 an hour, without the Union, rather than the \$11.00 an hour he was presently earning. Shaw told him not to repeat it. By this, Respondent violated Section 8(a)(1)(5) of the Act as alleged in Paragraph 22(a) of the Complaint. As no evidence was adduced in support of Paragraph 22(b), I recommend that it be
 20 dismissed.

Paragraph 23 alleges that Respondent, by Savino, on about February 11, 2004, at the facility, interfered with the employees' Union activities by disparaging the Union's shop steward, Feldman. This allegation relates to the events that followed the ATM meeting on about February
 25 11, 2004, where Feldman and Savino got into an argument over whether Feldman instigated other employees to ask questions at the meeting, and ended with Feldman calling Savino a liar and Savino calling Feldman a disgrace. The sole credibility issue involved in this allegation is who started this name calling. Although I have credited Feldman throughout this proceeding, and would do so regarding this allegation, I do not believe that it is necessary to do so herein. In *Sears Roebuck & Co.*, 305 NLRB 193 (1991), the Board stated: "Words of disparagement alone
 30 concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)...remarks, though flip and intemperate, are nonetheless only expressions of his personal opinion protected by the free speech provision of Section 8(c) of the Act." This incident appears to have been spontaneous and there is no evidence that any employee overheard this disagreement. I therefore recommend that the allegation contained in Paragraph 23 of the
 35 Complaint be dismissed.

Paragraph 24 alleges that since about November 2003, the Respondent imposed more onerous and arduous working conditions on its employees by assigning them heavier work loads in order to discourage their Union membership and support, in violation of Section
 40 8(a)(1)(3) of the Act. It is certainly clear that the Respondent had Union animus; what is not clear is that the Respondent increased the technicians' work load at the facility, in about November, and did so in retaliation for the employees' Union activities. The difficulty in establishing this violation is that the technicians' daily assignments are not easily subject to an objective standard. Feldman, the most credible witness herein, agrees with this, as does a fairly
 45 credible witness, Turturro, and the not-so-credible witnesses, Murphy and Shaw. Feldman testified that, "There's too many factors involved." The number of jobs assigned to the technicians daily depends upon the size of the house and the type of installation, as well as the experience and skill of the technician. An additional factor is whether the technician is working alone, or with another technician. Feldman testified that at the beginning of 2004, the
 50 Respondent increased the daily assignments to five. However, by then he was on light duty and had no direct knowledge of these assignments. In addition, when he was assigned to work with Alvarez, they were assigned two to four jobs. I therefore find a lack of evidence to establish this

violation, and recommend that the allegation contained in Paragraph 24 be dismissed.

Finally, it is alleged that the Respondent discharged Feldman in violation of Section 8(a)(1)(3)(4) of the Act. As stated above, there is no question of the extent of Feldman's Union activities, the Respondent's knowledge of it, and the Respondent's Union animus. In addition, the timing of the discharge took place shortly after Feldman resisted attempts by the Respondent and its agents to decertify the Union. Further, it appears that Respondent's disciplinary procedure provides for a verbal warning for the first offense, a written warning for the second offense and termination for the third offense. Feldman's only prior offense was a verbal warning for what appeared to be a minor offense two years earlier. The discharge on March 3, 2004 seems not to comport with the Respondent's usual procedures. I therefore find that Counsel for the General Counsel has satisfied her initial burden under *Wright Line*, 251 NLRB 1083 (1980). It must next be determined if the Respondent has established its burden that it would have fired Feldman even absent his Union activities, and I find that the Respondent has not satisfied this burden. I have credited Feldman's testimony that on the morning of February 26, 2004 he told Lannon that he had to leave by 5:30 and Lannon assured him that it wouldn't be a problem. I would also credit Hibbert's testimony that he overheard this conversation between Feldman and Lannon. In that regard, Shaw testified that it was on the morning of March 3, 2004 that he first heard of Feldman's claim that he had told Lannon on the morning of February 26, 2004 that he had to leave early that day. It makes one wonder what kind of an investigation the Respondent conducted. They waited six days before telling Feldman that he was being discharged. What took so long when they didn't even bother to question Feldman and Lannon, the central characters in the issue. The one valid point that Respondent makes in this issue is that Feldman left the job even after being warned not to do so by Murphy. However, my reading of Feldman's testimony reveals that his refusal of the order was clearly foreseeable by the Respondent. The relationship was clearly strained and Feldman knew that he had previously received permission to leave work early that day. Murphy knew Feldman well enough to anticipate that he would leave early that afternoon even after being warned not to do so. Further weakening the Respondent's case is Lannon's testimony that at about 3:30 Gratullo told him that when he completed his job he would cover the Feldman/Alvarez job, and Lannon anticipated that he would complete his job by 4:30 or 5:00, and Lannon called the customer between 4:30 and 4:45 and told her that somebody would be there within the hour to complete the job. Therefore, by about 3:30, the Respondent was aware that Gratullo would be covering the job within an hour or two, so there was no reason for Murphy to threaten Feldman that he had better remain at the job. For all these reasons I find that the Respondent has not satisfied its burden under *Wright Line*, and find that by discharging Feldman on March 3, 2004, the Respondent violated Section 8(a)(1)(3) of the Act. As there was no evidence connecting his discharge with his Board activity, I recommend that the Section 8(a)(1)(4) allegation be dismissed.

E. Bargaining Allegations. Paragraphs 31 and 32 of the Complaint.

There are numerous allegations that the Respondent, in its collective bargaining negotiations with the Union from about September to January 2004, engaged in bad faith bargaining. The principal witnesses regarding these allegations are Basara, the chief negotiator for, and admitted agent of, the Respondent, and DiPietro, for the Respondent, and Larry DeAngelis, international staff representative for the Union and its principal negotiator beginning in about September, Richard Nemschick, a business agent for the Union, and Feldman. This subject will initially be discussed chronologically, and then by allegation.

There was some brief testimony about statements that Basara allegedly made at a bargaining session on April 29. Nemschick testified that at this meeting, after the Union gave

him a proposal, Basara said that it looked like something that they could consider or accept and “we’re closer than I expected to be at this point in time.” He testified further that, at this time, there were still numerous unresolved issues, such as wages and benefits.

DeAngelis testified that the September 9 bargaining session was his first in this series of negotiations. Also present for the Union were Nemschick, Union vice president Bob Morrow, and Feldman; for the Respondent, Basara and DiPietro. Feldman’s testimony about this meeting does not mention Morrow. DeAngelis testified that the procedure employed by the Union in negotiations is to place a notation next to each of its proposals to signify the results of the bargaining. For example, next to one article in one of its proposals is written: “OK, 10/10/01” meaning that proposal was agreed to on the date specified. At the September 9 meeting, DeAngelis introduced himself to Basara and said that he would now be in charge of bargaining for the Union as Trainor, his predecessor, had been promoted. At this meeting, Basara gave him the Respondent’s counter proposal to the Union’s April 29 proposal. When they examined this counter proposal, they noticed that there was a change in previously agreed upon language regarding wages, and the signature page was for a different union in a different location. DeAngelis testified that during the earliest bargaining between the parties, the parties negotiated about basic wage increases, proposed by the Union, and merit pay and increases, employed by, and proposed by the Respondent and they eventually agreed that the Respondent could employ merit pay and increases. However, the Respondent’s September 9 counter proposal: “Rejected our proposal and went to straight base pay.” Another change in this counterproposal was in Article 10, the company/union relationship proposal. Rather than notifying the Union of any new employees having been hired, the Respondent proposed to notify the Union steward. When he asked Basara about this change, Basara said that he got in trouble on this issue in a prior Board case and that is why he made the change. The parties then discussed Article 12, non-discrimination, which the Union had put an “OK” next to, indicating that it had previously been agreed to, but “the company then went and changed...that language.” When he asked Basara why the Respondent did so, he said that they didn’t feel they wanted to do anything more than what the law stated they had to do.”

DeAngelis testified that there was also a discussion about Article 12, non-discrimination, of the Union’s April 29 proposal, which they had marked with an “OK.” This provision states that the Company and Union agree that they will not discriminate against any employee due to his/her race, color, religion, sex, age, etc, or because of his/her union activities, or for other specified reasons. At the September 9 session, the Respondent changed this provision to state: “The Company and the Union agree that they will abide by all state, local and federal laws regarding discrimination.” When DeAngelis asked Basara why he made that change, Basara said that he didn’t want to do anything more than what the law stated that he had to do. Article 4, Agency Shop, provided that after 30 days of employment employees would become Union members or pay the equivalent dues to the Union. This provision also had an “OK” next to it. The Respondent’s counter proposal on September 9 omitted this provision. When DeAngelis asked why, Basara told him that there is no agreement until a final agreement is signed and, until that time, they could make whatever changes they desire. Section 4 of Article 14 of the Union’s April 29 proposal, Company-Union relationship, also has an “OK” next to it. It states that Union representatives may request a reasonable amount of time off, without pay, for Union activities with the understanding that such requests shall be submitted in writing at least five days in advance, whenever possible. This section is missing from the Respondent’s September 9 counter proposal. When DeAngelis asked why, Basara said, “There is no agreement on any language until there’s a signed agreement.” At the conclusion of this meeting, DeAngelis told Basara that his theory of bargaining is that when the parties agree on a provision, they sign off on it. As they reach agreement on certain provisions that they had agreed to, they take them off the table and work on other provisions. Basara repeated that there is no agreement until the

whole thing is signed. DeAngelis testified that during the negotiation sessions that he attended, there was never a discussion of proposals being part of a “package.”

Counsel for the General Counsel alleges a number of infirmities in the Respondent's September 9 counter proposal to the Union's April 29 proposal. Not only does the signature page list the wrong union (An IBEW union), which mistake Basara attributes to his secretary, but the article numbers are all changed from the Union's proposal. Further, the Grievance Procedure counter proposal (Article 4) states:

Any employee may notify his/her immediate supervisor or the General Manager of a grievance either verbally or in writing. The supervisor or General Manager shall review the grievance and provide an immediate response. Any employee dissatisfied with a response may contact the local human resources representative for purposes of objecting to the decision and receiving a response to such objection.

Article 11, Basis of Compensation, sets the wage rate at \$12.00, subject to yearly performance reviews, apparently, at the sole discretion of the Respondent. Article 16, Benefits, provides that all the health plans and other benefits will be provided to the employees “in the same manner as to the Company's non-bargained installation employees” and that the selection of the carriers, the cost and benefits of these plans “shall be the sole responsibility of the Company, and such matters will not be subject to bargaining, grievance or other legal challenge.”

DeAngelis testified that, at that meeting, he and Basara had an “off the record” discussion that DeAngelis requested with his bargaining team present. He told Basara that he wanted to protect his membership and, at the same time, keep the Respondent healthy and strong. Basara told him “that his job at this bargaining session was to not give us a contract or to give us such a bad contract that it would never get ratified.”⁴ Nemschick testified that “...George had made a statement...this is...not word for word—but that he would, his goal is to either not give us a contract at all, or to give us a contract so bad that the membership would never accept it.” He does not recollect anything else that was said in this regard because, “I was just floored with that statement.” Feldman testified that all he could recollect of what Basara said was, “that his job was not to give us a contract.” He testified: “I was so shocked by that, and I just didn't hear anything after that.”

Basara testified that he never made the statement that Nemschick, DeAngelis and Feldman attributed to him. September 9 was the first session where DeAngelis was the lead negotiator for the Union. Prior to that he had negotiated with Trainor. At this meeting: “DeAngelis offered his philosophy with regard to negotiations. Generally, it was he was there to get a fair contract for his members; that he did not want this to be adversarial.” He told DeAngelis: “I was there to get a contract in the best interest of my client. I did not at any time, nor would I at any time as an experienced negotiator, blurt out ‘I'm not going to give you a contract’ or something to that effect ‘I'm going to give you something the membership would never accept.’” Further, he did not have any off the record discussions with DeAngelis at this session: “I certainly was not going to hold an off the record discussion with a guy I didn't know.” DiPietro testified that DeAngelis told them that he was taking over as the lead negotiator for the Union, and that he thought he could get a fair contract for his members if both sides compromised. Basara responded that he was there to obtain the best contract for his client, the

⁴ In his affidavit given to the Board, DeAngelis did not mention this “off the record” statement by Basara because: “It was an off the record conversation and when I bargain, or...have an off the record conversation, I consider it off the record.”

Company; he was not there to get a contract that the Union liked. Basara testified about his method of negotiating:

Q So, tentative agreement is different from okay?

A From my perspective, yes.

Judge Edelman: From my understanding in connection with the testimony that tentative agreement is not something that you deal with in collective bargaining. You don't sign off on any tentative agreement?

A Mr. Basara: No.

Judge Edelman: So that you can say that, therefore, I'm not locked into any proposal at any time?

A Yes. Because I look at the agreements as a whole. From my own experience, I know how things change in bargaining and how one proposal affects another proposal. And I have operated from a standpoint of I don't sit there and sign off on tentative agreements. When I have an agreement, I have one...

Judge Edelman: In other words, everything has to be resolved. The total contract has to be resolved before you go to sign it. And whenever every item and detail in every clause is agreed to then you sign an agreement.

Mr. Basara: Yes.

Judge Edelman: And there is no such thing as a tentative agreement, even though you might approve—at a particular point in time you may say "Yes, the Union has made this proposal and its okay."

Mr. Basara: Yes.

He testified that some valid reasons for withdrawing from previously agreed upon contract provisions are the passage of time, changes in the law, arbitration decisions relevant to the provision, and "pure experience in negotiating collective bargaining agreements might enter into it." Basara's testimony about the lack of agreement at these negotiations is belied by his own bargaining notes, which contain many notations of "agreed," "looks OK", "we said OK," "OK" and check marks next to Union proposals.

DeAngelis testified that they next met briefly on October 29 and reached agreement on the safety article, which he marked "OK 10/29." There were also discussions on seniority for vacations and layoff, but no agreement. The parties next met on November 18. At the commencement of this meeting, he asked Respondent to give the employees the wages that had been withheld during negotiations. Basara said that he would get back to the Union on that subject. They discussed seniority: "We discussed the fact that the Company rejected seniority in totality. And at times we feel that they seemed to have agreed to...seniority." They then discussed the management rights clause. DeAngelis told Basara that if they changed a technician's tour, they should give him prior notification. Basara said no. Basara also said that the Company wanted to retain the right to change the premium for medical benefits. Basara testified that during the prior negotiations, he asked Trainor if the Respondent could give the employees merit wage increases: "They are expecting their merits. We prefer to do that if we

can have your approval to do it. Mr. Trainor turned us down. He said, "No. We're negotiating wages. We don't want any increases given." He testified further that at the end of the following year, presumably 2002, he again told Trainor that they would like to give the employees merit raises: "And again, his reply was that he didn't want to do that, which is his right." At the

5 November 18 meeting, DeAngelis said that: "...they would like to have us grant the employees their merit increases and basically bring them up to the same level as other employees were being paid in nearby facilities...Basically they were saying give us the merits. We'll just agree with your evaluations. Bring everybody up at that point in time." Because this was a major change in the Union's position which, if agreed to, would have caused a substantial increase in

10 the Respondent's wage rate expense at the facility, Basara told DeAngelis that he would attempt to obtain a response for him at the meeting scheduled for the following day, but he wasn't certain that he could, because he had to consult with Respondent's main office in Denver.

15 The parties met again the following day, November 19. DeAngelis testified that at this meeting they discussed each article separately. Some of the articles that the Union proposed at this meeting were proposals of the company that the Union was agreeing to. He asked Basara if he would sign off on some of these articles with a TA (tentative agreement) to get them off the table so that they could work on other issues: "And he refused to sign any of these, even his,

20 the language that we agreed to, the company language. Even the articles we agreed to his language on, he refused to sign off on in these sessions." Basara's explanation was that there is no acceptable language until a whole contract is signed off on. They then discussed subcontracting. The Union's counter-proposal on subcontracting removed the term "Union busting tactic" from its April 29 proposal to address Basara's concern. It stated:

25 The Union acknowledges the fact that the Company has a history of subcontracting out work, which is also performed by installers under the terms of this Agreement. Nothing In this Agreement limits the Company's right to continue to subcontract out work that is also performed by the bargaining unit employees. It is the earnest intent that the

30 aforementioned subcontracting will not result in an eroding of the bargaining unit or the curtailing of work of the bargaining unit.

DeAngelis asked again whether the company would give the employees the wage increases to make up for the prior years⁵. Basara told him that they were willing to give the raises, "but we

35 have to have a couple of things happen. One is we want you to sign off on the new handbooks so that can have everybody in the country working under the handbook. And number two is we want to get rid of the point system so that they come in line with what everybody else in the country is doing." The Union caucused and responded that they weren't interested in points or the medical, but they wanted the market adjustment:

40 Q But the market adjustment is different than bringing everybody up to the same standard. Because the market adjustment is not a merit increase, it's a market adjustment. Is that right?

45 A Yes.

Q Just so we're clear and the Judge can be clear. There were a few things happening with people around the country. They were getting their normal merit increases---

50 ⁵ Unit employees at the facility had not received a wage increase since, at least, the end of 2001.

A Uh-huh

5 Q But then there was a one-time market adjustment made in various markets just because there were more expensive places to live—

A And that's what we were asking for, market adjustment.

10 Q But that differed from your proposal the day before, right?

A No, it was the same proposal. Maybe I stated it wrong, but it was the same. The discussion always was around the market proposal.

15 Basara testified that there was no agreement on the merit increases at the November 19 meeting. He told the Union representatives that he would give the increases they requested:

20 But they, in return, had to do a couple of things. One would be to do away with the point system.⁶ The second thing would be we had proposed a new handbook that became a point of contention between the parties and the subject of an unfair labor practice complaint. What I asked was that they agree to the new handbook. And also, back in, I believe, 2002- and it might have even been 2001- the Company had modified its health benefits program a little bit. I don't think it was significant. But there were some different co-pays or whatever in that program. And we had not made that change for the Farmingdale employees. Because, again, that would have been a unilateral change and they wouldn't allow us to do it. And so I said, "I'll give you the increases, but come in line with—no more points. Come in line with our current handbook and come in line with our current health benefit program and I can do this for you."

30 They caucused...They came back in and they sat down and they said, "Well, we only want the market adjustment." That's the \$2.00 an hour adjustment for the geographic area within which you would work and live. "We don't want the merit increases. We just want you to give us the market adjustment, and we don't want to give in on the handbook, the points or the health here."

35 Basara told them that he wasn't giving the market adjustment without getting the points removed and there was no agreement on these issues.

40 The Non-Discrimination clause in the Union's counter-proposal dated November 19, stated:

The Company and the Union agree that they will abide by all state, local and Federal laws relating to discrimination.

45 Nothing in this Agreement shall be applied or interpreted to restrict the Company from taking such action as it deems necessary to fully comply with any federal, state or local laws, statutes, ordinances, rules, regulations and executive orders.

50 ⁶ The point system as used by the Respondent for its technicians is an incentive commission system, for example, to reward the technicians for extra sales they make while at a home to perform an installation.

DeAngelis testified that there was verbal agreement on this provision and there is a notation: "TA 11/19/03" under this provision.

The next meetings were held on January 29 and 30, 2004. DeAngelis testified that they gave the Respondent a counter-proposal that they believe addressed the Respondent's concerns. Basara said that they needed an hour to look over the proposal. Later, they called back to say that they needed the rest of the day to go over the proposal, and a meeting was scheduled for the morning of January 30, 2004. When they met that day, the Respondent presented the Union with its counter-proposal, and the parties discussed each article in the counter-proposal. They discussed the recognition clause. The Union's proposal, with "OK" adjacent to it, stated:

The Company recognizes the Union as the sole collective bargaining agent for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment for all of its bargaining unit employees.

The Respondent's counter-proposal at the January 30, 2004 meeting changed the words "bargaining unit employees" to "installers at the Farmingdale, NY facility." When DeAngelis asked about this, Basara again said that there's no agreement until a whole agreement is reached. The Respondent's counter-proposal totally rejected the Union's seniority proposal, with no substitute language. Basara again said that there is no agreement until he signs off on the contract. Article 14, Company-Union Relationship, contained five paragraphs in the Union's proposal, four of which were agreed to on October 10, 2001. The Respondent's counter-proposal made no change to the first and third paragraph. The second paragraph, with an "OK 10/10/01", stated:

The Company will notify the Union when new employees enter the Bargaining Unit. During the orientation of new hires, each party will bring to the attention of new employees the relationship between the parties and the Union's status as exclusive representative of those employees in the Bargaining Unit.

The Respondent's counter-proposal turned over at this meeting stated simply: "The Company will notify the Union Steward when new employees enter the Bargaining Unit." DeAngelis was asked:

Q So, that the Union and the company do not have an agreement on that proposal, do they?

A Not only don't we have an agreement, but you changed an already agreed upon language from 10/10/01.

Q Okay. There's some language in there that I modified, is that right?

A Not modified, you destroyed it.

As regards wages, the Union's proposal covered three pages and included merit and retroactive increases. The Respondent's counter-proposal lowered the FS-3 rate from \$14.52 an hour to \$14.00, and states:

Employees will thereafter be subject to performance reviews on a yearly basis at which time their new wage rate will be set in accordance with regular Company practices. Employees must be performing the regular functions of their installer position in order to

be considered for an increase. Employees will not be entitled for any compensation based upon “points” for work performed or any commission payments.

DeAngelis testified that this would give the Respondent the power to set wages unilaterally, and he told Basara that this was a step back from prior discussions. He was willing to accept the Respondent’s elimination of the point system for a corresponding increase in wages to make up for the loss of the points, but that was not offered. The Union’s proposal on medical benefits, Article 22, Section 1, provides that these benefits will be provided to the unit employees “in the same manner as to the Company’s non-bargained employees, and that the Company agrees to notify the Union of any changes in the plans that would result in decreased benefits,” and that: “The selection of the insurance carriers, the establishment of all terms and conditions and administration of the benefit plans shall be the sole responsibility of the company, and such matter will not be subject to bargaining, grievance or other legal challenges.” Section 2 of this article states that the employees’ premium contributions for the benefits will remain the same during the term of the agreement. The Respondent’s counter-proposal changes Section 1 by stating that Respondent will notify the Union steward, rather than the Union of any plan changes, and changes Section 2 by stating that the employees’ premium contributions shall be the same as those of the non-unionized installers. DeAngelis testified that the problem with this counter-proposal is that it would give the Respondent the authority to unilaterally increase the bargaining unit employees’ cost whenever the non-unit employees’ cost were increased. The parties then discussed the subcontracting provision of the proposals, Article 24. The Union’s proposal on this subject acknowledged the Respondent’s past history of subcontracting and that “Nothing in this Agreement limits the Company’s right to continue to subcontract out work that is also performed by the bargaining unit employees. It is the earnest intent that the aforementioned subcontracting will not result in an eroding of the bargaining unit or the curtailing of work of the bargaining unit.” The Respondent’s counter-proposal to this, removed the last sentence of this proposal. Basara explained his objection to this article the same way, that until there is a complete agreement, there is no agreement.

The next bargaining session took place on April 27, 2004. DeAngelis gave Basara the Union’s counter-proposals prepared for the meeting, and Basara asked for some time to review it. The recognition clause, which Respondent had previously changed from bargaining unit employees to installers at the Farmingdale, NY facility, was agreed upon as “Field Specialists.” Some articles were agreed upon, while the major articles described above, were not. Basara testified that after he was given the Union’s counter-proposal that day, he returned that afternoon and gave the Union his response verbally. They said that they needed some time to consider it, and they didn’t return until the following morning when they told him that they were not yet ready to respond, and never did. That was the final negotiation session.

Basara testified that when he and Trainor began these negotiations in 2001: “He indicated to me that he was reserving the right to change the proposals and modify them. And I agreed that that was the way we would bargain this contract. And I too reserved that same right in terms of our ability to modify the proposals.” In regard to his method of bargaining, Basara testified: “I indicated to them that I am not intending to bargain the contract on a piecemeal basis...I don’t bargain contracts word-by-word or paragraph-by-paragraph basis like this. You can’t just pick three proposals and say that I said okay and then all of a sudden there would be points that I can’t bargain over again.” He testified further that when the Union asked him to “TA” certain proposals, he told them: “I don’t TA proposals like that. I look at contracts in the whole.” He also testified that although the Union never agreed with his method of negotiating:

It was a statement by me as to how I would negotiate the contract. In negotiations, my opinion is they have the ability to negotiate the way they choose to negotiate. I can’t

control their negotiations or their method by which they negotiate. Likewise, I don't think they have the right to control the way by which I negotiate as long as I explain what my method is, which I attempted to do with Mr. Traynor.

- 5 On the covering page of the Union's initial proposal, dated October 10, 2001, it states: "The Union's Proposal for a New Collective Bargaining Agreement with Dish Network Service Corporation. The Union reserves the right to modify, substitute, delete or add to its proposals."

10 Paragraph 31(a) alleges that the Respondent changed the Non-Discrimination provision after the parties had reached agreement on it. The Union's proposal on April 29 for Non Discrimination provided that employees would not be discriminated against for reasons of race, color, religion, sex, age, national origin, marital status, sexual orientation, support for the Union, being disabled or any other classification protected by applicable law. There is an "OK" next to this provision, and Basara does not deny having initially agreed to it. However, in September,
15 the Respondent proposed a Non-Discrimination clause stating only that: "The Company and the Union agree that they will abide by all state, local and federal laws relating to discrimination." Basara testified that he made the change because of the changes that occurred over the period of time and he concluded that his language would be "much cleaner" and "encompassed everything that they had in their article." His bargaining notes state that, at the November 18
20 bargaining session the Union agreed to his Non-Discrimination provision, and that change was also agreed to by the Union at the following bargaining sessions as well. DeAngelis testified that at the last negotiating session between the parties reached a "verbal agreement" on the following non-discrimination provision:

25 The Company and the Union agree that they will abide by all state, local and federal laws relating to discrimination.

30 Nothing in this Agreement shall be applied or interpreted to restrict the Company from taking such action as it deems necessary to fully comply with any federal, state or local laws, statutes, ordinances, rules, regulations and executive orders.

35 Paragraph 31(b) alleges that the Respondent changed Section 1, Paragraph 2 of the Company-Union relationship provision after the parties had reached agreement on it. Paragraph 31(c) alleges that the Respondent withdrew Section 4 of the Company-Union Relationship provision after the parties had reached agreement on it. The Union's initial proposal on this subject in November 2001, listed as Article 14, contained seven sections and covered three pages. Basara's response was that he agreed to the first four sections, with the exception of the final sentence in Section 3, and rejected Sections 5 through 7. Basara testified:

40 ...all I was saying was that the language in one, two and four were generally agreeable. But there was a lot of other stuff in there that I rejected. And my position was that it's basically a signal to them saying this is where I'm at with your proposal. If you want to propose something else, go right ahead. But by no means am I saying that I can agree to Section 1 and then you can put whatever you want in Sections 5, 6 and 7 and I still
45 agree to Section 1. I don't know that until I see the return proposals from the Union. So I'm not agreeing to anything at this point other than the language that you have there looks like something I could agree to at some point in the future once we worked out the rest of Article 14.

50 The next discussion of this article to his recollection took place in March or April. His notes state that he agreed to the first paragraph and the first sentence of the second paragraph of Section 1, agreed to Section 2 and 4, agreed, with two exceptions, to Section 3, and rejected Section 5.

At the next meeting he presented his counter-proposal, numbered Article 10, containing three sections, to the Union's Company-Union Relationship proposal. One difference between his counter-proposal, and the Union's most recent proposal was that Basara's proposal provided that the time spent by a Union representative, presumably the steward, assisting an employee in a disciplinary meeting would not be considered work time. The Union's proposal provided that the Union representative may request a reasonable amount of time off, without pay, for Union activities (which section states "OK 10/10/01"), and the time spent on Union activities, not to exceed 400 hours per year, would not be deducted from the representative's seniority. At the negotiations on October 29, the Union repeated this request. At the negotiations on January 29, 2004, the Union's proposal on Article 14, had five sections. Sections 3 and 5 were in bold type indicating a change in the wording.

On January 30, the Respondent gave the Union a response to its proposal given to the Respondent on November 19. In its response, the first paragraph of Section 1 is unchanged. The second paragraph of this section has been changed to state that the Company will notify the Union **steward** of new hires, rather than just the Union, Section 2 remained the same, while Sections 3, 4 (which had an "OK10/01/01), and 5 are not mentioned. Basara testified that there was no agreement on that date, or ever, on Article 14.

Paragraph 31(d) alleges that the Respondent proposed a Management Rights provision that granted the Respondent almost complete control over all significant terms and conditions of employment. Basara testified that on March 19, 2002 he proposed a management rights provision that begins by stating:

Except as expressly modified or restricted by a provision of this Agreement, all statutory and inherent managerial rights, prerogatives, and functions are retained and vested exclusively in the Company, including, but not limited to the rights, in accordance with its sole and exclusive judgment and discretion to reprimand, suspend, discharge, or otherwise discipline employees; to determine the number of employees to be employed; to hire employees, determine their qualifications and assign and direct their work; to promote, demote, transfer, lay off, recall to work; to require employees to undergo drug and/or alcohol testing; to set the standards of productivity, the products to be produced and/or the services to be rendered; to determine the amount and forms of compensation for employees; to maintain the efficiency of operations; to determine the personnel, methods, means and facilities by which operations are conducted; to set the starting and quitting times and the number of hours and shifts to be worked; to use independent contractors to perform work or services; to subcontract, contract out, close down or relocate the Company's operations or any part thereof; to expand, reduce, alter, combine, transfer, assign, or cease any job, department, operation, or service; to control and regulate the use of machinery, facilities, equipment, and other property of the Company; to introduce new or improved research, production, service, distribution, and maintenance methods, materials, machinery and equipment; to determine the number, location, and operation of departments, divisions, and all other units of the Company; to issue, amend and revise rules, regulations and practices; to take whatever action is either necessary or advisable to determine, manage and fulfill the mission of the Company and to direct the Company's employees.

The Company's failure to exercise any right, prerogative, or function hereby reserved to it, or the Company's exercise of any such right, prerogative or function in a particular way, shall not be considered a waiver of the Company's right to exercise such right, prerogative or function or preclude it from exercising the same in some other way not in conflict with the express provisions of this Agreement.

Basara testified that the lead sentence in this provision ("Except as expressly modified or restricted...") is: "...fairly typical of the management's rights proposals in my experience in that what you're telling them is that if it's in the contract, the contract controls. If it's not in the contract, management reserves the rights to do what's in the management's rights proposal." The Union's April 29 proposal on Management Rights, at Article 24, states: "Subject to applicable law, all rights possessed by the Employer prior to the recognition of the Union, which rights are not governed by the terms of this Agreement, are reserved by the Employer." At this bargaining session, the Union said that their proposal was the same as his, and Basara responded that if they were the same, the Union should agree with his proposal, but they refused to do so, and no agreement was reached on that issue. DeAngelis testified that at this meeting he told Basara: "...that the meat of your language said the same thing. Stating your separate policies in the ...document wasn't necessary because we stated it in a paragraph." The testimony continued:

Q So, this was really just a matter of you wanting your language and me wanting mine, isn't that right?

A No, I wouldn't characterize it that way because you also asked for...the ability to unilaterally change what was negotiated. And that's a big difference...

Q Just to clarify this point. Does my lead in sentence in my management rights proposal indicate that I can't change anything that's in the contract? I think that's what you testified to. Is that right?

A In your first sentence, yes, you say that. But it can be construed that in your last paragraph you wipe that out by your statement in your last paragraph.

There was further discussion of this issue at the October 28 bargaining session, but no settlement and, apparently, no movement. On November 19 the Union proposed the following Management Rights Provision:

a) Subject to applicable law, all rights possessed by the Employer prior to the recognition of the Union, which rights are not governed by the terms of this Agreement, are reserved by the Employer.

b) The company's failure to exercise any right, prerogative or function hereby reserved to it, or the company's exercise of such right, shall not be considered a waiver of the company's right to exercise such right. Except such action is in conflict with the provisions of this Agreement [sic].

Paragraph 31(e) of the Complaint alleges that the Respondent proposed a grievance procedure which, at the first stage, required employees to attempt to resolve disputes directly with their immediate supervisors or Respondent's general manager, without notice to or involvement of the Union and, at the final stage, left the ultimate decision with Respondent's human resources representative. The first grievance arbitration proposal was presented by the Union, apparently, in 2002. It had five sections, providing for three steps, including arbitration. The first step involved the employee, his immediate supervisor and the steward. The second step involved a written complaint by the Union or the Employer and consultation of the Union's local vice president and the Respondent's general manager, or their designees, in an attempt to settle the matter. If they cannot settle the matter, it is submitted to the American Arbitration Association, for selecting an arbitration panel. On March 19, 2002, the Respondent submitted its

counter-proposal on the grievance arbitration clause:

Section 1. A grievance may be raised by either party over a dispute which directly relates to the interpretation or application of the language of the parties' collectively bargained agreement.

Section 2. Grievances will be adjusted in the following manner:

First Step: The aggrieved party shall notify the General Manager of the grievance within three (3) working days of the occurrence and attempt to reach a resolution of the dispute.

Second Step: If no resolution is reached, the Grievant shall contact his or her shop steward who will, in turn, file a formal written grievance within three (3) working days of the General Manager's decision under the first step (above).

The written grievance shall state 1) Grievant's name, 2) the date of the occurrence, 3) a full description of the occurrence, 4) the specific contract provision violated, and 5) the relief requested.

Third step: The General Manager shall consult with the Company's Human Resources Department and the shop steward before making a final decision on the grievance. The General Manager shall issue his/her final decision in writing to the shop steward. Each decision will stand on its own merits. Past practices and previous decisions relating to the same or similar issues shall not be considered by the General Manager. The General Manager's decision shall be final.

At a negotiation session on October 2, 2002, Basara resubmitted this proposal. He testified that there was, "...a fair amount of discussion about this. The Union wanted a grievance and arbitration provision. I indicated that we did not want an arbitration procedure." Basara told the Union that he would agree to "some form of grievance procedure to make sure that grievances were heard. But the Company did not wish to give up its right to manage its work force and allow a third party to do it." At a meeting on October 15, 2002, the Union requested that the Company notify the shop steward of the existence of the grievance and Basara agreed to this. He testified that Trainor said that he was, "...contemplating working with us on just developing a grievance procedure and not having arbitration in the contract." At the Union's request, Basara agreed to give the employee five days, rather than three, to make his complaint to the general manager and that a steward would be involved at the second step and would have seven days to file a response to the general manager. He testified: "So, that's the kind of discussions we're having. We weren't agreeing on it, but those are the discussions that we were having so they could feel more comfortable with the provision that I had given them."

At the April 29 meeting, the Union proposed a "Grievance Procedure-Arbitration" clause, although it contained no provision for arbitration. Step 1 was an informal discussion by those involved, including the shop steward and the immediate manager. If unresolved, Step 2 involved the Union filing an appeal within fifteen days, to the general manager. If still unresolved, Step 3 involved consultation between the Union's vice president and the Respondent's regional manager, or their designees, in an effort to adjust the dispute. On September 8, Basara presented a counter-proposal on the subject:

Any employee may notify his/her immediate supervisor or the General Manager of a grievance either verbally or in writing. The supervisor or General Manager shall review

the grievance and provide an appropriate response. Any employee dissatisfied with a response may contact the local human resources representative for purposes of objecting to the decision and receiving a response to such objection.

5 At a meeting on November 18, the Union submitted another proposal on Grievance Arbitration including an arbitration provision. Step 1 in this proposal provided for a meeting between the Employer and the Union steward. Absent settlement, the dispute shall be reduced to writing by the steward within twenty days and would be considered by representatives of the Respondent and the Union. Absent agreement, it would be decided by an arbitrator from the New York State
10 Board of Mediation, whose decision would be binding and final. The Union, basically, resubmitted this proposal at the January 29, 2004 meeting. The Respondent "red lined" this proposal to the substance of its last proposal on the subject: that the dispute would first be discussed by the employee and the employer and if not settled, it would be put in writing by the steward and a response would be provided to the steward. No arbitration was provided for, and
15 there was never agreement reached on this subject.

DeAngelis testified that the problem with the Respondent's grievance arbitration position was that the employees would not have the protection afforded by it. During negotiations, Basara told him that the problem with his proposal was that it included an arbitration provision.
20 During negotiations, the Respondent offered a grievance provision, but no arbitration. DeAngelis is aware that employees without a grievance-arbitration clause have a right to strike, and testified that Basara never requested a no strike clause during negotiations.

Paragraph 31(f) alleges that the Respondent informed the Union during negotiations that
25 it was there not to agree to a contract and/or to give a contract so bad that the membership would never accept it. This relates to the alleged conversation at the September 9 meeting discussed above. Paragraphs 31(g) and (h) allege that the Respondent rejected the Union's proposed compensation structure after insisting on such structure, represented to the Union that the parties were close to agreement on it, and proposed that future wage increases or
30 decreases be exclusively within the Respondent's discretion. Basara testified that the Union originally proposed "...a very traditional way of negotiating wage structure":

Basically, they were discussing a service and step procedure. In other words, if you have
35 one year of service you'll get paid X amount of dollars the first year. Then, as you move up and...you gain experience, you get paid more money. And then, also, each year the contract would have bump ups in terms of the amount of hourly wage that somebody would get. That's the way the Union came to the table expressing their desire to negotiate a contract along those lines.

40 The Company had a different way of doing business than that. For the employees that it had in Dish Network Services Corporation at that time, employees were paid a certain hourly rate. And then each year, at the beginning of the year, they would get an evaluation from their supervisors. And based upon that evaluation and score, they would get an increase called a merit increase.

45 Also, at that time, the Company had a point system. And the point system gave the employees points for doing, in essence, sales work out in the field...So, there was a commission kind of component to this...the more difficult work you were performing you would get points. These were additional ways for them to make compensation over and
50 above their hourly wage. So they had constructed this method to give incentive to the employee.

He testified that the Union was insistent upon their structure, and he was insistent on the Respondent's structure. The parties never reached agreement on wages; in fact, he testified that they were never close to agreement on wages. The Union's initial proposal on wages in March 2002 provided for a 5% wage increase in 2002, with a 4% increase in each of the two following years. The Union's proposal provided for a wage structure that ranged up to \$23.80, \$25.96 and \$28.12 by 2004 for FS-1, FS-2, and FS-3, respectively. Basara testified that this proposal was totally inappropriate and unacceptable for the Company, and he told the Union so. Basara's counter-proposal was that the hourly wage rates would be as follows: FS-1, \$11.00; FS-2, \$12.00; FS-3, \$13.00, with increases or decreases dependent upon a yearly appraisal of the employees' work performance by his/her supervisor or the general manager. At a meeting in October 2002, Basara presented the Union with a counter-proposal on wages. FS-1 would earn \$11.25 hourly in 2003, \$11.50 in 2004, and \$11.75 in 2005. FS-2 would earn \$12.00 in 2003, \$12.25 in 2004 and \$12.50 in 2005. FS-3 would earn \$12.50 in 2003, \$12.75 in 2004 and \$13.00 in 2005. He testified: "I took out the merit aspect of my proposal and I tried to come in line with what was more like a Union's proposal...I thought that this might start some process in terms of bargaining with them...to something that I thought was manageable for the Company."

The next meeting was on October 14, 2002. At this meeting, at Trainor's request, Basara gave him the range of pay for the technicians. He also told him that they could discuss these ranges and keep the merit increases. Trainor asked if they still had the incentive (point) system, and Basara told him that they only had it at the facility and in Pittsburgh. He testified that as a result of the growth of the Company, the installers grew disenchanted with the point system, so they decided to do away with it and they used a formula to increase the hourly wage, in lieu of the points, in all other locations: "We can't make those unilateral changes to the compensation structure without negotiating with the Union. And we brought that to the attention of the Union, and Dennis had asked about whether we still had incentives in Long Island. And I was telling him that we did and we were maintaining that structure there." At this meeting, the Union's proposal was for wage rates to be \$12.55, \$14.09 and \$15.87 for FS-1, FS-2, and FS-3 respectively with a 4.5% increase each year. Basara testified that these wage rates were the high end of the range for the classifications. At a December 12, 2002 meeting Trainor asked if the Company would "move people to the 2000 rates for this area" and Basara said that they would as long as it would include the merit system of increases. He testified that wages had been frozen at the facility because Trainor, "...refused to allow us to provide the employees with merit increases. He indicated from the very beginning of negotiations that wages would be a subject of negotiations. And he did not want us to be giving out merit increases while we were discussing wages. So we abided by those wishes during the course of these negotiations."

Basara testified that the Union next gave him a wage proposal, four handwritten pages, apparently on April 28. It set forth "market adjusted salaries" for 2002 and 2003, provided that merit increases would be, at a minimum, 1%, and provided six additional sections of proposals. Basara testified that this was not acceptable because their merit system ranged from zero to about 5%: "Now, certainly, very few people got zero, but it was certainly a potential especially if you were intending on sending a message to an employee that he needed to improve." The Company presented a counter-proposal on September 8. The Basis of Compensation provision provides that FS-1, FS-2 and FS-3 hourly wage rates would be \$12.00, \$13.00 and \$14.00, and states:

Employees will thereafter be subject to performance reviews on a yearly basis, at which time their new wage rate will be set. Employees will have to meet the requirements of FSS certifications as set by the Company. Employees must be working in a full duty capacity to receive any FSS increase. Employees will not receive any compensation based upon "points" for work performed.

On January 29, 2004 the Union presented a counter-proposal on wages. It provided that the FS-1, FS-2, and FS-3 “market adjusted salary” would be \$12.00, \$13.20 and \$14.52 in 2002, and \$13.00, \$14.30 and \$15.76 in 2003. In addition, the proposal included an additional page of proposals on wages, including the fact that the minimum merit raise would be 1%. Basara testified that this proposal didn’t make much sense because it proposed increases for 2002 and 2003, while being presented in 2004.⁷ On the following day, the Company responded by “redlining”, i.e., rejecting the entire proposal except agreeing to wage rates of \$12.00, \$13.00 and \$14.00 for FS-1, FS-2, and FS-3 employees.

Since negotiations began, the unit employees at the facility had not received a wage increase. Basara testified that throughout his negotiations with Trainor, Basara told him that the Company would like to give the employees merit increases, but Trainor refused, saying: “We’re negotiating wages. We don’t want any increases given.” As stated, *supra*, when DeAngelis took over the negotiations from Trainor, he told Basara that he would like the Respondent to give the employees increases to bring them up to what employees were being paid at the nearby facilities: “Basically they were saying give us the merits. We’ll just agree with your evaluations. Bring everybody up at that point in time.” Because that would have been a fairly significant single increase in the hourly rates, Basara said that he was not prepared to agree to it on that day, but he would attempt to have an answer to the Union the following day. On the following day, after consulting with the Respondent’s main office, he told the Union that he would agree to the requested merit increases if the Union would agree to three items: to agree to do away with the point system, to agree to the Respondent’s new handbook, and to agree to the increased costs or copays in the Respondent’s health benefit plan. The Union caucused and returned saying that they only wanted the market adjustment (\$2.00 an hour) rather than the merit increases, and they would not agree to the elimination of the points, and would not agree to the new handbook or the increase in health costs. Basara told him that he wasn’t giving the market adjustment without the elimination of the points. No agreement on merit pay was reached on that day. DeAngelis testified that his bargaining notes state that at the meeting on November 18 he asked Basara to give the unit employees raises to bring their salary up to where it should be. On the following day, Basara stated that he would give the employees the raises if the Union would agree to the elimination of the point system and “to sign off on the new handbook,” but he refused to agree to this.

As regards the allegation in Paragraph 31(g), Basara testified further:

I never represented to the Union that the parties were close to agreement on the wage issue and wages. In terms of rejecting structures after they changed their structure, what I was trying to do was find a structure that we could operate under. When they were operating under the traditional step procedure, I tried that avenue. When they came back and said, “we think the merit system might work” I went to that avenue. I was willing to try to be flexible to find a structure that we would use. But the parties could not reach a meeting of the minds on that.

Paragraph 31(i) alleges that the Respondent changed the subcontracting provision after the parties had reached agreement on it. Basara testified that the Respondent’s installations has its peaks and valleys and the nature of the business is that when you can’t fill all your orders with unit employees, you turn to subcontractors to perform the extra installations, and

⁷ It might have made sense if the Union was requesting that these raises be paid retroactively.

there is a large contingent of subcontractors available in the New York area: “And really from the early stages of the negotiation I made it very clear to the Union that we were not going to give up our right to subcontract out work. Because it really was a part of the fabric of our business and how we operate.” On March 19, 2002, the Respondent proposed the following subcontracting clause:

The Union acknowledges the fact that the Company has a history of subcontracting significant amounts of work which is also performed by installers under the terms of this Agreement. Nothing in this Agreement limits the Company’s right to continue to subcontract out the type of work that is also performed by the bargaining unit employees. The Union and its member employees agree that they will not challenge the Company’s right to subcontract out installation work in any court, agency or other legal forum.

On April 29, the Union presented the following proposal on subcontracting:

The Union acknowledges the fact that the Company has a history of subcontracting out work, which is also performed by installers under the terms of this Agreement. Nothing in this Agreement limits the Company’s right to continue to subcontract out work that is also performed by bargaining unit employees. It is the earnest intent that the aforementioned subcontracting will not result in an eroding of the bargaining unit or the curtailing of work of the bargaining unit and such subcontracting will not be used a Union busting tactic. [sic]

Basara testified that he was concerned with some of the language in this proposal, especially the terms “earnest intent” and “Union busting.” Therefore, on September 8, he presented the following proposal to the Union:

The Union acknowledges the fact that the Company has a history of subcontracting out work, which is also performed by installers under the terms of this Agreement. Nothing in this Agreement limits the Company’s right to continue to subcontract out work that is also performed by the bargaining unit employees.

This proposal is identical to the Union’s proposal, above, without the last sentence, which Basara was “concerned” about. On January 29, 2004, the Union presented a subcontracting counter-proposal identical to its April 29 proposal, but deleting the words: “and such subcontracting will not be used a Union busting tactic.” Basara testified that although the Union removed the offending “Union busting” language, he had “problems” with other language in this proposal, presumably, the eroding and curtailing the bargaining unit work language, and this proposal was unacceptable. In line with this objection, the Company’s final proposal on the subject, redlined the Union’s proposal and removed the final sentence about eroding and curtailing the work. The Union’s final proposal on the subject, made on April 27, 2004, substitutes the following for the controversial final sentence: “When subcontracting will cause the layoff of bargaining unit employees the Company will meet with the Union to discuss alternative actions.” The Company rejected this proposal, and reoffered its last proposal on the subject. Basara testified that there was never a final agreement on this subject.

DeAngelis testified that Basara’s objection to the Union’s April 29 subcontracting proposal was the use of the term “Union busting,” which Basara said that he found insulting, but that the balance of the article was acceptable. However, the Respondent did not accept the Union’s subsequent proposals, even without this term. Basara also said that the Respondent would employ subcontractors only as fill-ins, so they removed the sentence referring to the

eroding of the bargaining unit.

Paragraph 31(j) alleges that the Respondent proposed a medical plan identical to Respondent's current plan and thereafter reserved the right to unilaterally alter the plan as related to carriers, coverage, premiums, and deductibles. Basara testified that the Union's initial proposal on medical benefits, apparently in November 2001, stated: "The Union is proposing substantial improvements in the Medical Plan." The Respondent's response on November 28, 2001 was, "Rejected. The Company will continue to provide the current medical plan or a plan with similar benefits for employees." The Respondent employs 20,000 people nationwide who are covered by its medical plan. Basara testified that, in the course of bargaining, he told DeAngelis that he would not make changes to this plan only for the unit employees: "However, if we altered the plan for 20,000 other employees, then they would be subject to the same alterations. So we could not...treat them worse than we treated everybody else in the country." On April 29, 2002 the Union presented a seven page medical benefits proposal to the Company; when Basara asked them what such coverage would cost, they said that they did not know. On October 2, 2002, the Respondent responded: "Medical and dental benefit proposal is rejected. The Company offers the current benefits offered employees for the year 2003. Beginning January 2004, the Company retains the right to modify the health plans in terms of carriers, coverages, premiums and deductibles." He testified that he retained the right to make changes because of the major increases in the cost of health care: "I did not want to create a situation where I was locking this particular group of employees into something that I'm not sure we could afford...for the future." On April 29, the Union proposed that current benefits under the Respondent's medical plans will be provided to the unit employees:

...in the same manner as to the Company's non-bargained employees. The Company agrees to notify the Union of any changes in such plans that would decrease the benefit therein. The selection of the insurance carriers, the establishment of all terms and conditions and administration of the benefit plans shall be the sole responsibility of the Company, and such matters will not be subject to bargaining, grievance or other legal challenge.

Section 2. The employees' premium contribution for the benefits outlined in Section 1 will remain the same during the term of this Agreement.

The Company's counter-proposal on September 8 eliminated the employee stock option plan, the 401(k) plan and the federal credit union, as well as Section 2 of the Union's October 29 proposal. On January 10, 2004 the Union's presented a medical benefits proposal substantially identical to its April 29 proposal. Basara redlined this proposal by making some minor changes in Section 1 (including notifying the Union steward, rather than the Union), and changed Section 2 to state: "The employees' premium contributions for the benefits outlined by Section 1 will be the same as those contributed by the non-Union installers." On April 27, 2004 the Union presented a medical benefits proposal that was practically identical to its proposal a year earlier. It was rejected and there was no agreement reached on this subject. Basara testified:

Judge Edelman: ...I mean, when you have no unions you can make the changes as you will with a medical plan.

Mr. Basara: Yes.

Judge Edelman: Obviously. That goes without saying. And it would appear from the contract that you proposed that would be essentially the same thing as was taking place throughout the country

Mr. Basara: Yes.

5 Judge Edelman: Well, what you are really saying then is that we wanted is to keep conditions in Farmingdale the way they were around the country.

Mr. Basara: With regard to medical, yes.

10 Judge Edelman: Well, it's like saying that we're not going to give any union medical plan that's different than any plan that we have throughout the country.

Mr. Basara: That was my proposal. Yes.

15 Paragraph 31(k) alleges that the Respondent refused to discuss the seniority clause after agreeing to do so. Basara testified that there were discussions of seniority on October 29. The Respondent agreed that there would be no loss of seniority for stewards attending Union or Company business. The Union requested preference for layoffs based upon seniority. He responded that the Company would consider seniority as one of the factors in layoff decisions. Basara's bargaining notes state that at the November 18 bargaining sessions, DeAngelis asked
20 Basara, "Are you willing to discuss seniority?" and Basara answered "yes." On April 27, 2004 the Union made the following seniority proposal, at Article 8:

25 Section 1 Seniority shall mean continuous employment with the Employer, beginning with the date on which the employee first begins to actually work for the Company.

Section 2 If more than one employee has the same seniority date, the last four digits of the social security number will be used to establish the ranking. The employee with the lowest number will be considered the most senior.

30 Basara's bargaining notes of that meeting, next to Article 8 states: "OK." As to whether he believed that the parties had reached a tentative agreement on seniority on that date, he testified, "I believe that we had reached an agreement on what the language would look like. Yes."

35 Paragraph 32(l) alleges that the Respondent refused to acknowledge an agreement on provisions relating to classification of employees, travel and non-discrimination after the parties had reached agreement on them. Basara testified that during a meeting:

40 Mr. DeAngelis walks in, hands me this group of proposals and asks me to TA them. And that's not how we were bargaining...And I said, put the proposal in the context of a complete agreement, then we can talk. But, I'm not going to sit here and start to TA proposals at this session."

45 The final allegation, Paragraph 31(m), alleges that the Respondent changed the recognition provision after the parties had reached agreement on it. In 2001, the Union proposed the following recognition clause:

50 The Company recognizes the Union as the sole collective bargaining agent for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment for all of its bargaining unit employees.

This provision has an "OK" next to it, and Basara testified: "That is one of the ones that they

listed as an okay I believe dating back to an okay that I had given in 2001 to that language.” Due to the subsequent growth of the Company since 2001, in reviewing the language of this provision, “...for purposes of being clear on who would be recognized as a bargaining unit member, I added the language “at its Farmingdale facility.” Which I discussed with the Union as to why I did it.” Ultimately, the Union agreed with this change with the understanding that the term bargaining unit employees would be changed to a Field Service Specialist. Basara disagreed and felt that installer would be a more appropriate and descriptive term, but eventually he agreed to change the term to Field Service Specialist.

F. Bargaining Allegation Analysis

The principal credibility issue herein relates to the alleged “off the record” statement made by Basara to DeAngelis at the September 9 meeting. There are differences between the testimony of DeAngelis, Nemschick and Feldman over this statement, but that is to be expected as nine months had passed since the meeting in question. In addition, Basara’s testimony that he would never make such a statement during such serious negotiations, especially to an individual whom he had not previously met, is fairly reasonable, although his actions over the following eight months appear to bear out the truth of the statement. Because I have previously found Feldman to be a highly credible witness, and because I believe DeAngelis’ explanation of why he did not include this statement in the affidavit he gave to the Board (it was an “off the record” statement) and found DeAngelis and Nemschick to be credible witnesses, I credit their testimony over Basara’s and find that at the September 9 meeting, Basara told the Union negotiators that his job was to either not give them a contract or to give them such a bad contract that the Union’s members would never ratify it.

Numerous cases discuss the thin dividing line between lawful hard bargaining and the failure to bargain in good faith in violation of Section 8(a)(5) of the Act. In *Regency Service Carts, Inc.*, 345 NLRB No. 44, the Board stated:

Under Section 8(d) of the Act, an employer and its employees’ representative are mutually required to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...but such obligation does not compel either party to agree to a proposal or require the making of a concession...” “Both the employer and the union have a duty to negotiate with a ‘sincere purpose to find a basis of agreement,’” but “the Board cannot force an employer to make a ‘concession’ on any specific issue or to adopt any particular position.” The employer is, nonetheless, “obliged to make *some* reasonable effort in *some* direction to compose his differences with the union if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all.” Therefore, “mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act.” [citations omitted]

As the Supreme Court stated in *NLRB v. Insurance Agents’ Union*, 361 U.S. 477, 485 (1960): Good faith bargaining “presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.” A violation may be found where the employer will only reach an agreement on its own terms and none other. [citations omitted] The Board, in *Atlanta Hilton and Tower*, 271 NLRB 1600, 1603 (1984) stated: “A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree.” Also, quoting from *West Coast Casket Co.*, 192 NLRB 624, 636 (1971): “From the context of the employer’s total conduct, it must be decided if the employer is lawfully engaged in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.” In *Public*

Service Company of Oklahoma (PSO), 334 NLRB 487 (2001), the Board stated: “Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining.”

In *Pease Company*, 237 NLRB 1069 (1978), the Board stated: “It is not, of course, the prerogative or desire of this Board to impose upon the parties any bargaining format, either substantive or procedural. It is, however, incumbent upon us to review the bargaining interactions of the parties when one party asserts that the Act’s requirement of good-faith bargaining has not been complied with.”⁸ In determining whether the employer bargained in bad faith, the Board looks to all of its conduct, “the totality of Respondent’s conduct,” both at and away from the bargaining table, as well as the substance of the proposals it has insisted upon. *Hydrotherm, Inc.*, 302 NLRB 990, 993 (1991); *Hardesty Company, Inc.*, 336 NLRB 258, 259 (2001); *St. George Warehouse, Inc.*, 341 NLRB 904, 906 (2004).

There is also the issue of Respondent, through Basara, withdrawing from previously agreed upon items with the warning that there is no agreement until there is total agreement on a contract. In *Cold Heading Company*, 332 NLRB 956, 971 (2000), the administrative law judge stated:

The Board recognizes that in the normal course of negotiations, there is much give and take until a final collective bargaining agreement is reached. Frequently, agreements may be reached on some issues, only to be modified as other issues come into play. Consequently, the Board has adopted the view that tentative agreements made during the course of contract negotiations are not final and binding. Parties negotiating for a contract always have the ability to make any provisions final and binding along the way, thus precluding any further negotiations on those issues, but there must be some evidence that the parties intended the provision to be final and binding. Absent such evidence, no agreement becomes final and binding until the final contract, in its entirety, is reached. [citations omitted]

However, the inquiry does not end there. While Basara’s withdrawal from previous agreement is not a *per se* violation, it could be considered evidence of bad faith bargaining. *Valley West Health Care, Inc.*, 312 NLRB 247, 252 (1993) and *Suffield Academy*, 336 NLRB 659 (2001) state that the withdrawal of proposals by an employer without good cause is evidence of the lack of good faith on its part. See also *TNT Skypak, Inc.*, 328 NLRB 468 (1999).

Respondent already has two strikes on it based solely upon its actions away from the bargaining table. I have previously found that the Respondent has engaged in numerous serious violations of Section 8(a)(1)(3) and (5) of the Act, most significantly, that it was involved in supporting the decertification petition and unlawfully discharged the Union’s sole shop steward. In addition, I have credited the testimony of DeAngelis, Feldman and Nemschick that Basara told them on September 9 that his job was either not to give them a contract, or to give them such a bad contract that the membership would never ratify it. The ultimate issue, therefore, is whether this statement, together with these unfair labor practice violations and

⁸ In this matter, the Board found: “...a review of the entire course of dealings of the parties reveals that Respondent engaged in a pattern of conduct evidencing a preconceived determination not to reach agreement except on its own terms, irrespective of the union’s bargaining powers, approach or techniques.”

Basara's withdrawal from previous agreements reached in bargaining, convert its hard bargaining to bad faith bargaining in violation of Section 8(a)(5) of the Act.

5 The record indicates that on numerous occasions during bargaining, Basara withdrew from prior agreements with the Union. This is established by the testimony of DeAngelis, Basara, and their bargaining notes. On each of these occasions, Basara's explanation for his withdrawal was that there was no agreement until there was a full agreement. As stated above, the withdrawal of proposals or prior agreements by one side in negotiations, without good cause, is evidence of the lack of good faith bargaining by that party, and the mere statement
10 that there is no agreement until there is complete agreement is not "good cause." The Board, in *White Cap, Inc.*, 325 NLRB 1166 (1998), found that the employer did not violate Section 8(a)(5) of the Act by threatening to withdraw from tentative agreements with the union and imposing a deadline for ratification by the union because the employer had previously stressed to the union the importance of timely implementation of the work changes that it was seeking. In contrast,
15 Basara had no valid reason for withdrawing from prior agreements. Although not an unfair labor practice in itself, it is further evidence of the Respondent's bad faith bargaining.

Counsel for the Respondent argues in his brief that the parties reached agreement on some issues, and that is true. However, the contractual provisions that they reached agreement
20 on were the less important issues, while there was a clear lack of agreement on the major contractual issues. Even with some issues that were eventually agreed to, it is difficult to find a valid reason for the Respondent's intransigence. For example, non-discrimination. Early on, the Union proposed, and Basara agreed, to a provision stating that the Respondent and the Union agree that they will not discriminate against any employee due to his/her race, color, religion,
25 sex, age, national origin, marital status, sexual orientation, support for the Union, disability or any other classification protected by applicable law. However, subsequently, Basara proposed a change in this provision to: "The Company and Union agree that they will abide by all state, local and federal laws relating to discrimination." One could argue that this would have the same effect as the prior provision that the parties had previously agreed to. The inference to be drawn
30 is that the only reason for withdrawing the approval of the earlier provision is to delay or hinder agreement on a contract. Company-Union relationship: the Union's proposal that the Respondent notify the Union of new employees having been hired seems like a subject that should be easily agreed upon. However, the Respondent insisted that the provision state that it would notify the Union **steward**, rather than the Union, and because of its insistence on this
35 change, no agreement was reached on this subject.

The Management Rights clause was the subject of a substantial amount of negotiations. The Respondent's proposal on March 19, 2002 covered in excess of a half page. On April 29,
40 the Union's proposal stated: "Subject to applicable law, all rights possessed by the Employer prior to the recognition of the Union, which rights are not governed by the terms of this Agreement, are reserved by the Employer." It appears to me that the Union's proposal states succinctly what the Respondent's proposal stated a year earlier, and yet Basara was not willing to agree to this proposal, and there was also no agreement on a subcontracting provision. The Union's proposals on this subject acknowledged the Respondent's use of subcontractors. An
45 early proposal of the Union states: "Nothing in this Agreement limits the Company's right to continue to subcontract out work that is also performed by bargaining unit employees. It is the earnest intent that the aforementioned subcontracting will not result in an eroding of the bargaining unit or the curtailing of work of the bargaining unit and such subcontracting will not be used a Union busting tactic." When the Respondent (correctly) objected to the "Union
50 busting" language in the proposal, the Union deleted it. When the Respondent continued to object to the "earnest intent..." language, the Union withdrew it and replaced it with: "When subcontracting will cause the layoff of bargaining unit employees the Company will meet with

the Union to discuss alternative actions.” The Respondent rejected this proposal as well. I find that the Respondent’s rejection of these last two subcontracting proposals is further evidence of its intent not to reach agreement with the Union. *Hardesty Company, Inc.*, 336 NLRB 258, 260 (2001); *Regency*, supra, at p. 5. There does not appear to be any valid reason for rejecting the Union’s proposal with the “earnest intent” language since, at the same time, the Respondent was insisting on a grievance clause without arbitration. Therefore, even with that language, it was simply words that were not enforceable. Even more difficult to understand is its rejection of the Union’s final proposal on the subject, acknowledging the Respondent’s right to subcontract, stating that nothing in the contract limits this right, but that if it will cause the layoff of unit employees, the Respondent would meet with the Union to discuss possible alternatives. This also was a harmless provision that simply said that they would meet to discuss possible alternatives, and Basara never satisfactorily explained why he would not agree to these proposals.

That is not to say that all of the Respondent’s negotiations were in bad faith. Some was very hard nosed bargaining that while difficult for the Union to accept, in my mind did not pass the line into bad faith bargaining by itself. Three examples of this were medical benefits, merit wage increases and the grievance arbitration clause. Although the Union eventually agreed to the Respondent’s proposal that the medical coverage be provided in the same manner as for the non-bargained employees, and that selection of the carrier and the terms and administration of the plan were the sole responsibility of the Respondent, not subject to bargaining, grievance or any legal challenge, the Union proposed that premiums not be increased during the term of the agreement. The Respondent refused to agree to this moratorium on premiums, but this refusal appears to have logic, rather than simply animus, behind it. With a nationwide plan covering all of its employees, and with the cost of medical coverage rising rapidly, often at an unpredictable rate, it was not unreasonable for the Respondent to hold fast on its refusal to accept the Union’s premium moratorium. It was also not unreasonable for the Respondent to refuse to accede to the Union’s final proposal on merit pay increases. The Union wanted merit pay increases to be a minimum of 1%. Basara testified that most increase would be in excess of that, but that there would be some employees who did not deserve any increase, and he didn’t want to be limited in that regard. I would also find that, while it was hard bargaining, it did not constitute bad faith bargaining. Finally, the parties were unable to agree to a grievance arbitration clause. The parties generally agreed on all but the final step in the process. The Union wanted the final step to be an impartial arbitrator; the Respondent rejected arbitration, providing instead that if the dispute had not been settled, it would be decided by its general manager or human resources representative. Although a grievance provision without arbitration is difficult for any union to accept, it is not unlawful for an employer to propose it and insist on it. I therefore find that the Respondent’s insistence on a grievance clause without an arbitration provision is not evidence of bad faith bargaining on its part.

Based upon the Respondent’s actions away from the bargaining table, especially its participation in the decertification petition, its bypassing the Union and its termination of Feldman, Basara’s statement to DeAngelis, Feldman and Nemschick on September 9, his withdrawal from numerous contractual agreements and his refusal to agree to some Union proposals, as discussed above, I find that the Respondent failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(1)(5) of the Act.

Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Bill Savino, John Shaw, Thomas Murphy, Christopher Lannon and Dominick Turturro have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent acting on its behalf.

4. Brian Bogart and Joseph Lugo, field installation technicians, have been agents of the Respondent acting on its behalf.

5. George Basara has been counsel and the main negotiator for the Respondent and has been an agent of the Respondent acting on its behalf.

6. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time field installation technicians employed by the Respondent at its Farmingdale facility located at 85 Schmitt Boulevard, Farmingdale, New York, excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

7. At all material times since June 21, 2001, the Union, by virtue of Section 9(a) of the Act, has been the exclusive representative of these unit employees for the purposes of collective bargaining.

8. The Respondent violated Section 8(a)(1)(5) of the Act in the following manner:

(a) Bypassed the Union and dealt directly with employees by promising them promotions to managerial positions so they would no longer be part of the unit, and informed employees that their transfer requests were denied because they were shop stewards. (Paragraph 11)

(b) Urged employees to sign a petition to decertify the Union, and bypassed the Union and dealt directly with employees by promising them wage increases if they decertified the Union. (Paragraphs 12 and 13)

(c) Bypassed the Union and dealt directly with employees by promising them wage increases, commissions and job security if they abandoned their Union support and membership, and informed employees that it would be futile for them to support the Union because it could not assist employees who were discharged. (Paragraph 15)

(d) Bypassed the Union and dealt directly with employees by promising them wage increases and other benefits if they decertified the Union. (Paragraphs 16, 19 and 22(a))

(e) Solicited employees' grievances with the implied promise that they would be remedied to their satisfaction. (Paragraph 17(a))

(f) Urged employees to sign a petition to decertify the Union. (Paragraph 21)

9. The Respondent violated Section 8(a)(1)(3) of the Act by discharging employee Brian Feldman on about March 3, 2003 and by failing and refusing to reinstate him to his former position of employment. (Paragraphs 25 and 26)

10. The Respondent has failed to bargain in good faith with the Union, the exclusive collective bargaining representative of the unit set forth above, in violation of Section 8(a)(1)(5) of the Act.

11. The Respondent has not violated the Act as alleged in Paragraphs 14, 17(b), 18, 20, 22(b), 23, 24 and 28.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As the Respondent discriminatorily discharged Feldman on March 3, 2003, it must offer him reinstatement to his former position and make him whole for any loss of earnings and other benefits that he suffered as a result of the discrimination, computed on a quarterly basis from the date of his discharge to the date of a full unconditional offer of reinstatement to his former position and hours, less any net interim earnings as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Counsel for the Charging Party, in his brief, requests that the Respondent be ordered to reimburse employee-members of the Union's bargaining team, presumably only Feldman, for wages lost because of attendance at negotiations, and to reimburse the Union for its bargaining expenses. Counsel for the General Counsel, in a letter dated November 23, 2004, subsequent to the due date for briefs in this matter, states that she "...joins in the Charging Party Union's request for extraordinary remedies..." and further requests that Respondent be required to pay litigation costs incurred by the Union and the General Counsel.

In *Unbelievable, Inc.*, 318 NLRB 857, 859 (1995), in establishing "a clear and consistent approach to the reimbursement of negotiating costs as a remedy for unlawful bargaining conduct..." the Board stated:

In cases of unusually aggravated misconduct, however, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. [citations omitted]

In *Teamsters Local Union No. 122*, 334 NLRB 1190, 1195 (2001), involving a union engaging in blatant bad faith bargaining, the Board granted negotiating expenses to the charging party, Busch, citing *Unbelievable*, stating:

The Board's traditional remedy of an affirmative bargaining order, standing alone, will not make Busch whole for the financial losses it incurred in bargaining with the Respondent, financial losses which the Respondent directly caused, and intended to cause, by its strategy of bad-faith bargaining. Reimbursement of negotiation expenses is therefore warranted to make Busch whole for the costs of its negotiations with the Respondent over a 2-year period and to restore the status quo ante...In the present case, not only was there a direct causal relationship between the Respondent's actions in bargaining

and Busch's losses, but the Respondent's very objective in bargaining was to create such losses to weaken Busch financially and to force it to sell to another employer.

In *Regency, supra*, at p. 7, the Board granted negotiation costs to the union because, " the Board's traditional remedy of an affirmative bargaining order, standing alone, will not make the Union whole for the financial losses it incurred in bargaining with the Respondent, financial losses which the Respondent directly caused by its strategy of bad-faith bargaining."

In the instant matter, negotiations have been ongoing since 2001⁹ with very little progress due to the lack of good faith bargaining on the part of the Respondent. Whether that was due to the Respondent's intent to "set a bad example" at the facility as a warning to other units in the country to think twice before organizing, or whether it was simply Basara's method of negotiations, it had to be a drain on the Union's resources. I therefore find that it is necessary and appropriate to order the Respondent to reimburse the Union for its negotiation expenses herein. This amount, like the backpay due to Feldman, will be determined at a compliance hearing. However, I find that Counsel for the General Counsel's request for litigation costs herein is not warranted. *Waterbury Hotel Management LLC*, 333 NLRB 482, fn. 4 (2001).

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Dish Network Service Corp., its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Bypassing the Union and dealt directly with employees by promising them promotions to managerial positions so they would no longer be part of the unit, and informing employees that their transfer requests were denied because they were shop stewards.

(b) Urging employees to sign a petition to decertify the Union, and bypassing the Union and dealt directly with employees by promising them wage increases if they decertified the Union.

(c) Bypassing the Union and dealing directly with employees by promising them wage increases, commissions and job security if they abandoned their Union support and membership, and informing employees that it would be futile for them to support the Union because it could not assist employees who were discharged.

(d) Bypassing the Union and dealing directly with employees by promising them wage increases and other benefits if they decertified the Union.

⁹ The Union's negotiation costs are limited to the Section 10(b) period, commencing on about August 2003.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Soliciting employees' grievances with the implied promise that they would be remedied to their satisfaction.

5 (f) Urging employees to sign a petition to decertify the Union.

(g) Discharging or otherwise discriminating against its employees because of their membership in, or support for, the Union, or any labor organization.

10 (h) Engaging in surface and bad faith bargaining with the Union, the certified exclusive collective bargaining representative of employees in the following appropriate unit:

15 All full-time and regular part-time field installation technicians employed by the Respondent at its Farmingdale, New York facility, excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

(i) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights as guaranteed by Section 7 of the Act.

20 2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days of the date of this Order, offer Brian Feldman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss that he suffered as a result of the discrimination against him, in the manner set forth above in the remedy section of this Decision.

30 (b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Feldman, in writing that this has been done and that the discharge will not be used against him in any way.

35 (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

40 (d) Pay to the Union its expenses incurred in collective bargaining, including, but not limited to, lost wages, if any, of Feldman or any other employee who attended the negotiations for the Union, from about August 2003 to the last negotiating session.

45 (e) Within 14 days after service by the Region, post at its facility in Farmingdale, New York copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60

50 ¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2003.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

IT IS FURTHER ORDERED that the Consolidated Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., April 6, 2006.

Joel P. Biblowitz
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT bypass Local 1108, Communications Workers of America, AFL-CIO, herein “the Union” and deal directly with employees by promising them promotions to managerial positions so they would no longer be part of the unit, and **WE WILL NOT** inform employees that their transfer requests were denied because they were shop stewards.

WE WILL NOT urge employees to sign a petition to decertify the Union and bypass the Union and **WE WILL NOT** deal directly with employees by promising them wage increases if they decertified the Union.

WE WILL NOT bypass the Union and deal directly with employees by promising them wage increases, commissions and job security if they abandoned their Union support and membership, and **WE WILL NOT** inform employees that it would be futile for them to support the Union because it could not assist employees who were discharged.

WE WILL NOT solicit employees’ grievances with the implied promise that they would be remedied to their satisfaction.

WE WILL NOT discharge or otherwise discriminate against our employees because of their membership in, or support for, the Union, or any labor organization.

WE WILL NOT engage in surface and bad faith bargaining with the Union, the certified exclusive collective bargaining representative of our unit employees at the Farmingdale, New York facility.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights as guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer Brian Feldman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights and privileges previously enjoyed, and **WE WILL** make him whole for any loss that he suffered as a result of the discrimination against him.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the

unlawful discharge of Brian Feldman, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL bargain in good faith with the Union and any agreement reached will be finalized to a written agreement.

WE WILL reimburse the Union for the expenses it incurred in collective bargaining negotiations from August 2003 to the last bargaining session.

DISH NETWORK SERVICE CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.